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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1934

No. 524

AKTIESELSKABET "CUZCO", AS OWNER OF THE NORWEGIAN STEAMSHIP "TOLUMA", PETITIONER,

vs.

STEAMSHIP "SUCARSECO," HER ENGINES, BOILERS, ETC., SUBMARINE BOAT CORPORATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 10, 1934.

CERTIORARI GRANTED DECEMBER 3, 1934.

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

A101-48

AKTIESELSKABET "CUZCO," as Owner of the Norwegian Steamship "TOLUMA," Libellant,

against

Steamship "SUCARSECO," Her Engines, Boilers, etc., SUBMARINE BOAT CORPORATION, Claimant

DOCKET ENTRIES

April 9, 1929. Filed libel and stipulation for costs.

May 20, 1929. Order entered substituting Kirlin, Campbell, Hickox, Keating & McGrann.

Dec. 10, 1929. Filed claim and stipulation for costs (Submarine Boat Corp.).

Dec. 10, 1929. Filed answer.

Dec. 11, 1929. Filed note of issue and notice of trial—Jan.

June 23, 1933. Filed consolidation and stipulation of facts—Patterson, J.

June 23, 1933. Filed opinion 7874, Patterson, J. (See Opinion.)

Aug. 7, 1933. Filed order amending amended libel by adding The Texas Co., & L. L. Jacobs as libellants.

Feb. 23, 1934. Filed final decree.

Feb. 24, 1934. Filed notice of appeal and allowance by appeal.

Feb. 24, 1934. Filed assignment of errors.

[fol. 2] In United States District Court, Southern District of New York

A103-152

Submarine Boat Corporation, as Owner, and Transmarine Corporation, as Charterer in Possession of the Steamship "Sucarseco" and as Bailee for Cargo Laden Thereon, Libellants,

against

Steamship "Toluma," Her Engines, Boilers, etc., the Aktieselskabet "Cuzco," as Owner, and Grace Line, Inc., as Charterer, Respondents

Docket Entries

Dec. 10, 1929. Filed libel and stipulation for costs.

Feb. 14, 1931. Filed notice of appearance and stipulation for costs. Grace Line and the S. S. "Cuzco."

Feb. 24, 1931. Filed claim and stipulation for costs (Aktieselskabet "Cuzco," claimant of S. S. "Toluma").

Mar. 6, 1933. Filed answer (Aktieselskabet "Cuzco").

[fol. 3] In United States District Court, Southern District of New York

A106-172

West India Oil Company and J. H. Senior, Agent, American Insurance Company, et al., Libellants,

against

Henry R. Sutphin and Irving Trust Company, Receivers for Submarine Boat Corporation and Transmarine Corporation, Respondents

Docket Entries

Dec. 29, 1930. Filed libel and stipulation for costs.

Jan. 2, 1931. Filed answer and stipulation for costs.

Jan. 6, 1931. Filed stipulation for costs.

Jan. 6, 1931. Filed note of issue and notice of trial—Feb. 1931.

Feb. 9, 1933. Filed comment and order providing that amended libel stand in place of libel and that answer to libel be deemed answer to amended libel. Goddard, J.

Feb. 9, 1933. Filed amended libel.

Aug. 7, 1933. Filed order amending libel by adding The Texas Co. and L. L. Jacobs as libellants.

[fol. 4] IN UNITED STATES DISTRICT COURT

LIBEL OF AKTIESELSKABET "CUZCO"

To the Honorable the Judges of the United States District Court for the Southern District of New York:

The libel of Aktieselskabet "Cuzco," as owner of the Norwegian steamship "Toluma," against the steamship "Sucarseco," her engines, boilers, etc., in a cause of collision, civil and maritime, alleges upon information and belief as follows:

First. At all times hereinafter mentioned, the libelant Aktieselskabet "Cuzco" was and now is a corporation organized and existing under and pursuant to the laws of the Kingdom of Norway, and it was and is the owner of the steamship "Toluma."

Second. The steamship "Sucarseco" is now, or will be during the pendency of process hereunder, within the United States and within the jurisdiction of this Honorable Court.

Third. The steamship "Toluma" is a single-screw steel cargo steamship of 7,041 gross tons, 5,234 net tons, 417.8 feet long, and 54.4 feet in beam. Until the collision hereinafter mentioned, the "Toluma" was tight, staunch and strong, and in all respects seaworthy and properly manned, equipped and supplied.

On the night of November 22, 1928, the "Toluma" was proceeding from Norfolk, Va., to Bahia Blanca, loaded with general cargo. The third officer was on watch on the bridge, a quartermaster was at the wheel, and a lookout was stationed on the forecastlehead. The weather was clear and moonlight, and visibility high. While the "Toluma" was [fol. 5] proceeding on a course South 55° East, the masthead and range lights of a vessel, which afterwards proved to be the "Sucarseco," were sighted bearing nearly broad

on the "Toluma's" port bow; and, a short while later, the "Sucarseco's" green side light came in sight. The "Toluma" and the "Sucarseco" were on relative courses and positions so that they were crossing vessels within the meaning of the Rules for the Prevention of Collisions, the "Toluma" being on the starboard hand of the "Sucarseco," and the "Sucarseco" being on the port hand of the "Toluma"; and they continued in those relative positions until the collision hereinafter mentioned occurred. After she was first sighted, the "Sucarseco" continued approaching the "Toluma" at unabated speed and without change of course, her bearing remaining about the same on the "Toluma's" port bow. The "Toluma" held her course and speed as she was required to do under the rules; but the "Sucarseco" continued on without alteration of course or speed until she was close aboard. The "Toluma" sounded a signal of one blast, stopped her engines, and, as the "Sucarseco" failed to answer the "Toluma's" signal and continued on without change of course or speed, the "Toluma" put her engines full speed astern in an effort to avert collision or mitigate the damage. Shortly thereafter, the "Sucarseco" sounded a signal of two blasts and commenced altering course to her port. This maneuver carried the forward end of the "Sucarseco" clear of the "Toluma," but the "Sucarseco's" starboard quarter, swinging under the effect of a starboard helm, swung into the port bow of the "Toluma," causing serious damage to the latter. After the collision occurred, [fol. 6] it was found that the "Toluma" was leaking, and she returned to Norfolk, where, after discharging cargo, repairs were effected.

Fourth. The aforesaid collision and the damages resulting therefrom were not caused or contributed to by any fault or negligence on the part of the "Toluma," or those in charge of her, but were caused wholly by and due solely to fault and negligence on the part of the "Sucarseco," and those in charge of her, in the following respects, among others which will be brought out upon the trial:

1. In that she was not in charge of competent and careful persons.

2. In that she did not keep a good lookout.

3. In that although she had the "Toluma" on her starboard hand in a crossing situation, she did not keep out of the way of the "Toluma."

4. In that she did not port her helm seasonably and pass under the stern of the "Toluma," but attempted to pass ahead of the "Toluma."

5. In that she did not slacken her speed or stop or reverse her engines.

6. In that she violated the statutory rules of navigation applicable to the situation.

7. In that she did not do anything to avoid collision.

[fol. 7] Fifth. By reason of the premises, and as a result of the collision, the libelant has sustained damage, consisting of the cost of repairs, demurrage, cost of discharging cargo to effect repairs, and other incidental and consequential damages, which, so near as can now be estimated, amount to the sum of $90,000.00, no part of which sum has been paid, although payment thereof has been demanded.

Sixth. All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, libelant prays that process in due form of law may issue against the steamship "Sucarseco", her engines, boilers, etc., and that all persons having or claiming any interest therein may be cited to appear and answer this libel, and that the steamship "Sucarseco" may be condemned and sold to pay the amount of libelant's claim, and that a decree may be entered in favor of the libelant against the said steamship "Sucarseco", her engines, boilers, etc., for the amount of the libelant's damages, with interest and costs, and that the court will grant to the libelant such other and further relief as the justice of the cause may require.

Kirlin, Woolsey, Campbell, Hickox & Keating, Proctors for Libelant and S. S. "Toluma", Office and P. O. Address, 27 William Street, Borough of Manhattan, City of New York.

[fol. 8] *Duly sworn to by William F. Cogswell. Jurat omitted in printing.*

[fol. 9] IN UNITED STATES DISTRICT COURT

ANSWER OF SUBMARINE BOAT CORPORATION TO LIBEL OF AKTIESELSKABET "CUZCO"

To the Honorable the Judges of the United States District Court for the Southern District of New York:

The answer of Submarine Boat Corporation, as claimant of the Steamship "Sucarseco", to the libel of Aktieselskabet "Cuzco", as owner of the Steamship "Toluma", in a cause of collision, civil and maritime, alleges and respectfully shows to this Honorable Court as follows:

First. Claimant denies that it has any knowledge or information sufficient to form a belief as to the truth of the allegations contained in Article First of the libel.

Second. Claimant admits the allegations contained in Article Second of the libel.

Third. Upon information and belief, claimant denies each and every allegation contained in Article Third of the libel except in so far as the same are expressly modified or admitted in Article Seventh of this answer.

Fourth. Claimant denies each and every allegation contained in Article Fourth of the libel.

Fifth. Claimant denies each and every allegation contained in Article Fifth of the libel.

Sixth. Claimant admits the admiralty and maritime jurisdiction of the United States and of this Honorable Court and denies that all and singular the premises of the libel are true, as alleged in Article Sixth thereof.

[fol. 10] Further answering the aforesaid libel, claimant alleges, upon information and belief, that the true facts and circumstances are as follows:

Seventh. On the evening of November 22, 1928, while the Steamship "Sucarseco," with a general cargo from New York destined for Pacific Coast ports via the Panama Canal, was southeast of Cape Henry, with running lights properly set and burning brightly, and all officers and members of her crew at their respective and proper stations, weather fair, sea smooth, visibility high, those in charge

of her observed abaft her starboard beam the port side light and well opened range lights of a vessel that subsequently proved to be the Steamship "Toluma".

The "Toluma" came up on the "Sucarseco" on a parallel course on which, if held, the "Toluma" would have overtaken and left the "Sucarseco" on her own port side with a wide margin of safety. The "Sucarseco" held her course and speed. When the "Toluma" came up to a position just forward of the "Sucarseco's" starboard beam, the "Toluma" was perceived to converge toward the "Sucarseco", at which juncture the "Toluma" blew a signal of one short blast on her whistle, indicating to those on board the "Sucarseco" that the "Toluma" was altering her course to her own starboard and away from the "Sucarseco", and in reliance thereon the "Sucarseco" held her course.

The "Toluma", instead of altering her course to her own starboard pursuant to her whistle signal of one blast as [fol. 11] aforesaid, suddenly and without warning swung to port toward the "Sucarseco". The "Sucarseco" thereupon immediately starboarded her helm and sounded two blasts on her whistle, indicating to those on the "Toluma" that she was directing her course to port and away from the "Toluma" in an endeavor to avert collision. When it was apparent that collision was imminent, those in charge of the "Sucarseco" put her helm hard aport, thereby causing the stern of the "Sucarseco" to swing away from the oncoming "Toluma", which maneuver, although unsuccessful in averting collision, lessened considerably the force of the blow of the "Toluma's" port bow as it came into contact with the starboard side of the "Sucarseco" in the way of her No. 4 hold, causing considerable damage to the "Sucarseco" and to her cargo.

Eighth. The said collision and consequent damage to the Steamship "Sucarseco" and her cargo were not caused or contributed to by any fault, neglect or want of care on the part of the libelants or those in charge of the Steamship "Sucarseco", but were due solely to the fault, neglect and want of care on the part of the Steamship "Toluma" and of the respondents, their agents, servants and employees in the following, among other, particulars, which will be pointed out at the trial of this suit:

1. In that those in charge of her were incompetent and inattentive to their duties.

2. In that those in charge of her failed and neglected to station and maintain a proper and efficient lookout.

3. In that the "Toluma", being the overtaking vessel, [fol. 12] failed to keep off and away from the "Sucarseco".

4. In that those in charge of her failed to hold her course while she was overtaking and passing the "Sucarseco".

5. In that those in charge of her failed to keep her off and away from the "Sucarseco."

6. In that those in charge of her permitted her to collide with and seriously damage the "Sucarseco" and her cargo.

7. In that those in charge of her failed and neglected to navigate in accordance with the one blast whistle signal which they blew to the "Sucarseco."

8. In that those in charge of her negligently starboarded her helm instead of porting her helm when she blew the one blast whistle signal to the "Sucarseco".

9. In that those in charge of her, after attempting to overtake and pass the "Sucarseco" on the "Sucarseco's" starboard hand, without warning, negligently altered her course to port.

10. In that those in charge of her failed seasonably to do anything to avoid collision, when risk of collision was, or should have been, apparent.

Ninth. All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

[fol. 13] Wherefore, claimant prays that the libel herein be dismissed with costs, and that it may have such other and further relief as in law and justice it may be entitled to receive.

Single and Single, Proctors for Claimant, Office and P. O. Address, 15 William Street, Borough of Manhattan, New York City.

Duly sworn to by Henry R. Carse. Jurat omitted in printing.

[fol. 14] IN UNITED STATES DISTRICT COURT

LIBEL OF SUBMARINE BOAT CORPORATION, ET ANO.

To the Honorable the Judges of the United States District Court for the Southern District of New York:

The cross-libel of Submarine Boat Corporation, as owner, and Transmarine Corporation, as charterer in possession of the Steamship "Sucarseco" and as bailee for cargo laden thereon, against Steamship "Toluma", her engines, boilers, etc., the Aktieselskabet "Cuzco", as owner, and Grace Line, Inc., as charterer, in a cause of collision, civil and maritime, alleges, on information and belief, and respectfully shows to this Honorable Court as follows:

First. At all the times hereinafter mentioned the Submarine Boat Corporation was and still is a corporation organized and existing under and by virtue of the laws of the State of New York, having its office and principal place of business at No. 5 Nassau Street, Borough of Manhattan, City, County and State of New York, and was and still is the sole owner of the American Steamship "Sucarseco", which, until the collision hereinafter referred to, was tight, staunch, strong and in all respects seaworthy and properly manned.

Second. At all the times hereinafter mentioned Transmarine Corporation was and still is a corporation organized and existing under and by virtue of the laws of the State of New Jersey, having an office for the transaction of business at 5 Nassau Street, Borough of Manhattan, City, County and State of New York, and was and still is the char-
[fol. 15] terer and operator of the Steamship "Sucarseco" and manned, victualed and navigated said vessel at its own expense or by its own procurement.

Third. At all the times hereinafter mentioned respondent, Aktieselskabet "Cuzco", was and still is a corporation organized and existing under and by virtue of the laws of the Kingdom of Norway and was and still is the owner of the Steamship "Toluma".

Fourth. At all the times hereinafter mentioned, respondent, Grace Line, Inc., was and still is a corporation organized and existing under and by virtue of the laws of the

State of New York, having an office at No. 10 Hanover Square, Borough of Manhattan, City, County and State of New York, and was at all the times hereinafter referred to the charterer and operator of the Steamship "Toluma".

Fifth. The Steamship "Toluma" is now, or during the pendency of process herein will be within this district and within the jurisdiction of this Honorable Court.

Sixth. On the evening of November 22, 1928, while the Steamship "Sucarseco" with a general cargo from New York destined for Pacific Coast ports via the Panama Canal was southeast of Cape Henry, with running lights properly set and burning brightly, and all officers and members of her crew at their respective and proper stations, weather fair, sea smooth, visibility high, those in charge of her ob- [fol. 16] served abaft her starboard beam the port side light and well opened range lights of a vessel that subsequently proved to be the Steamship "Toluma".

The "Toluma" came up on the "Sucarseco" on a parallel course on which, if held, the "Toluma" would have overtaken and left the "Sucarseco" on her own port side with a wide margin of safety. The "Sucarseco" held her course and speed. When the "Toluma" came up to a position just forward of the "Sucarseco" starboard beam, the "Toluma" was perceived to converge toward the "Sucarseco", at which juncture the "Toluma" blew a signal of one short blast on her whistle, indicating to those on board the "Sucarseco" that the "Toluma" was altering her course to her own starboard and away from the "Sucarseco", and in reliance thereon the "Sucarseco" held her course.

The "Toluma", instead of altering her course to her own starboard pursuant to her whistle signal of one blast as aforesaid, suddenly and without warning swung to port toward the "Sucarseco". The "Sucarseco" thereupon immediately starboarded her helm and sounded two blasts on her whistle, indicating to those on the "Toluma" that she was directing her course to port and away from the "Toluma" in an endeavor to avert collision. When it was apparent that collision was imminent, those in charge of the "Sucarseco" put her in helm hard aport, thereby causing the stern of the "Sucarseco" to swing away from the oncoming "Toluma", which maneuver, although unsuccessful in averting collision, lessened considerably the force of the blow of the Toluma's" port bow as it came into contact with

the starboard side of the "Sucarseco" in the way of her [fol. 17] No. 4 hold, causing considerable damage to the "Sucarseco" and to her cargo.

Seventh. The said collision and consequent damage to the Steamship "Sucarseco" and her cargo were not caused or contributed to by any fault, neglect or want of care on the part of the libelants or those in charge of the Steamship "Sucarseco", but were due solely to the fault, neglect and want of care on the part of the Steamship "Toluma" and of the respondents, their agents, servants and employees in the following, among other, particulars, which will be pointed out at the trial of this suit:

1. In that those in charge of her were incompetent and inattentive to their duties.

2. In that those in charge of her failed and neglected to station and maintain a proper and efficient lookout.

3. In that the "Toluma", being the overtaking vessel, failed to keep off and away from the "Sucarseco".

4. In that those in charge of her failed to hold her course while she was overtaking and passing the "Sucarseco".

5. In that those in charge of her failed to keep her off and away from the "Sucarseco".

6. In that those in charge of her permitted her to collide with and seriously damage the "Sucarseco" and her cargo.

7. In that those in charge of her failed and neglected to navigate in accordance with the one blast whistle signal [fol. 18] which they blew to the "Sucarseco".

8. In that those in charge of her negligently starboarded her helm instead of porting her helm when she blew the one blast whistle signal to the "Sucarseco".

9. In that those in charge of her after attempting to overtake and pass the "Sucarseco" on the "Sucarseco's starboard hand without warning, negligently altered her course to port.

10. In that those in charge of her failed seasonably to do anything to avoid collision, when risk of collision was, or should have been apparent.

Eighth. By reason of the foregoing, libelants have sustained damage in the making of repairs, survey fees and demurrage, and the cargo laden on board the "Sucarseco" has been damaged and survey fees and demurrage incurred thereon, all in the sum of Thirty-five thousand Dollars ($35,000) as nearly as the same can now be estimated, no part of which has been paid, although payment thereof has been duly demanded.

Ninth. All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, libelants pray that process in due form of law and according to the course and practice of this Honorable Court in causes of admiralty and maritime jurisdiction [fol. 19] may issue against respondents and against said Steamship "Toluma", her engines, boilers, tackle, apparel and furniture, and that the respondents and all persons having or claiming to have any interest in the Steamship "Toluma" be cited to appear and answer all and singular the matters aforesaid, and that this Honorable Court may be pleased to decree to libelants their damages, with interest and costs, and that the Steamship "Toluma" be condemned and sold to satisfy the claim of libelants, and that libelants may have such other and further relief as in law and justice they may be entitled to receive.

Single and Single, Proctors for Libelant, Office & P. O. Address, 15 William Street, Borough of Manhattan, New York City.

Duly sworn to by Henry R. Carse. Jurat omitted in printing.

[fol. 20] In United States District Court

Answer of Aktieselskabet "Cuzco" to Libel of Submarine Boat Corporation, et ano.

To the Honorable the Judges of the United States District Court for the Southern District of New York:

The answer of Aktieselskabet "Cuzco," respondent, and claimant of the steamship "Toluma," to the cross-libel of Submarine Boat Corporation, as owner, and Transmarine

Corporation, as charterer in possession of the steamship "Sucarseco," and as bailee of the cargo laden thereon, in a cause of colision, civil and maritime, alleges as folows:

First. It denies it has any knowledge or information sufficient to form a belief as to the matters alleged in Article First of the cross-libel, except that it denies, on information and belief, that the steamship "Sucarseco," until the collision described in the cross-libel, was tight, staunch, strong, and in all respects, seaworthy and properly manned.

[fol. 21] Second. It denies that it has any knowledge or information sufficient to form a belief as to the matters alleged in the Second Article of the cross-libel.

Third. It admits the matters alleged in the Third Article of the cross-libel.

Fourth: It denies that it has any knowledge or information sufficient to form a belief as to the matters alleged in the Fourth Article of the cross-libel except that it admits, on information and belief, that Grace Line, Inc., was the charterer of the steamship "Toluma"; but it denies, on information and belief, that the said Grace Line, Inc., was the operator of the steamship "Toluma."

Fifth. It admits the matters alleged in the Fifth Article of the cross-libel.

Sixth. On information and belief, it denies the matters alleged in the Sixth Article of the cross-libel except such matters as may be herein specifically admitted.

Seventh. On information and belief, it denies the matters alleged in the Seventh Article of the cross-libel.

Eighth. On information and belief, it denies the matters alleged in the Eighth Article of the libel, except that it admits the making of demand and non-payment.

Ninth. On information and belief, it denies the matters alleged in the Ninth Article of the cross-libel except that [fol. 22] it admits the premises are within the admiraly and maritime jurisdiction of the United States and of this Honorable Court.

Further answering, the respondent and claimant alleges that the true facts and circumstances of the collision mentioned in the cross-libel are as follows:

Tenth. On the night of November 22, 1928, the "Toluma" was proceeding from Norfolk, Va., to Bahia Blanca, loaded with general cargo. The third officer was on watch on the bridge, a quartermaster was at the wheel, and a lookout was stationed on the forecastlehead. The weather was clear and moonlight, and visibility high. While the "Toluma" was proceeding on the course South 55° East, the masthead and range lights of a vessel, which afterwards proved to be the "Sucarseco," were sighted bearing nearly broad on the "Toluma's" port bow; and, a short while later, the "Sucarseco's" green side light came in sight. The "Toluma" and the "Sucarseco" were on relative courses and positions so that they were crossing vessels within the meaning of the Rules for the Prevention of Collisions, the "Toluma" being on the starboard hand of the "Sucarseco," and the "Sucarseco" being on the port hand of the "Toluma"; and they continued in those relative positions until the collision hereinafter mentioned occurred. After she was first sighted, the "Sucarseco" continued approaching the "Toluma" at unabated speed and without change of course, her bearing remaining about the same on the "Toluma's" port bow. The "Toluma" held [fol. 23] her course and speed as she was required to do under the rules; but the "Sucarseco" continued on without alteration of course or speed until she was close aboard. The "Toluma" sounded a signal of one blast, stopped her engines, and, as the "Sucarseco" failed to answer the "Toluma's" signal and continued on without change of course or speed, the "Toluma" put her engines full speed astern in an effort to avert collision or mitigate the damage. Shortly thereafter, the "Sucarseco" sounded a signal of two blasts and commenced altering course to her port. This maneuver carried the forward end of the "Sucarseco" clear of the "Toluma," but the "Sucarseco's" starboard quarter, swinging under the effect of a starboard helm, swung into the port bow of the "Toluma," causing serious damage to the later. After the collision occurred, it was found that the "Toluma" was leaking, and she returned to Norfolk, where, after discharging cargo, repairs were effected.

The aforesaid collision and the damages resulting therefrom were not caused nor contributed to by any fault or negligence on the part of the respondent and claimant or

of the "Toluma," or those in charge of her, but were caused wholly by and due solely to fault and negligence on the part of the cross-libelants and on the part of the "Sucarseco," and those in charge of her, in the following respects, among others, which will be brought out upon the trial:

1. In that she was not in charge of competent and careful persons.

2. In that she did not keep a good lookout.

[fol. 24] 3. In that although she had the "Toluma" on her starboard hand in a crossing situation, she did not keep out of the way of the "Toluma."

4. In that she did not port her helm seasonably and pass under the stern of the "Toluma," but attempted to pass ahead of the "Toluma."

5. In that she did not slacken her speed or stop or reverse her engines.

6. In that she violated the statutory rules of navigation applicable to the situation.

7. In that she did not do anything to avoid collision.

Eleventh. All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, the respondent and claimant of the steamship "Toluma" prays that the cross-libel herein be dismissed with costs and disbursements," and that this Honorable Court grant to the respondent and claimant, Aktieselskabet "Cuzco," such other and further relief as the justice of the cause may require.

Kirlin, Campbell, Hickox, Keating & McGrann, Proctors for Respondent and Claimant, Office and Post Office Address, 27 William Street, Borough of Manhattan, New York City.

[fol. 25] *Duly sworn to by William H. McGrann. Jurat omitted in printing.*

[fol. 26] IN UNITED STATES DISTRICT COURT

Index No. 106-172

[Title omitted]

ORDER PERMITTING AMENDED LIBEL OF WEST INDIA OIL COMPANY ET AL. TO BE FILED IN PLACE OF ORIGINAL LIBEL—Feb. 9, 1933

Upon the subjoined consent signed by the proctors for the respondents in the above entitled suit and on motion of Bigham, Englar, Jones & Houston, proctors for libellants, it is

Ordered that the annexed amended libel and complaint be, and the same hereby is, ordered filed in place and stead [fol. 27] of the original libel filed herein, and that the answer of the Receivers heretofore filed to the original libel may stand as the answer of the said respondents to the amended libel.

Henry W. Goddard, U. S. D. J.

Consented to:

Single and Single, Proctors for Respondents.

IN UNITED STATES DISTRICT COURT

AMENDED LIBEL OF WEST INDIA OIL COMPANY ET AL.

To the Honorable the Judges of the United States District Court for the Southern District of New York:

The amended libel and complaint of West India Oil Company and J. H. Senior, Agent, American Insurance Company, Atlantic Mutual Insurance Company, Automobile Insurance Company, British & Foreign Marine Insurance Company, Connecticut Fire Insurance Company, Continental Insurance Company, Eagle Star & British Dominions Insurance Company, Federal Insurance Company, Fidelity Phenix Insurance Company, Firemen's Fund Insurance Company, Globe & Rutgers Fire Insurance Company, Great American Insurance Company, Home Insurance Company, Insurance Company of North America, Norwich Union Fire Insurance Company, Phoenix

Insurance Company, Providence-Washington Insurance Company, Royal Insurance Company, Sea Insurance Company, Standard Marine Insurance Com-
[fol. 28] pany, Thames & Mersey Marine Insurance Company, Union Insurance Society of Canton, Ltd., Union Marine Insurance Company, Universal Insurance Company, United States Fire Insurance Company, United States Merchants & Shippers Insurance Company, and others, Owner, Shipper and Underwriters of certain cargo laden on the Steamship "Toluma", against Henry R. Sutphen and Irving Trust Company, Receivers for Submarine Boat Corporation and Transmarine Corporation, in a cause of collision, civil and maritime, on information and belief, respectfully alleges as follows:

First. At and during all the times hereinafter mentioned, West India Oil Company, a New Jersey corporation, was owner, and J. H. Senior, agent, was shipper and agent for the owner of certain cargo laden on the steamship "Toluma," hereinafter set forth, and the insurance companies hereinafter named were insurers of said cargo or other cargo laden on the steamship "Toluma" and were corporations organized, existing and doing business by virtue of the laws of the several States of the United States:

American Insurance Company,
Atlantic Mutual Insurance Company,
Automobile Insurance Company,
British & Foreign Marine Insurance Company,
Connecticut Fire Insurance Company,
Continental Insurance Company,
Eagle Star & British Dominions Insurance Company,
Federal Insurance Company,
Fidelity Phenix Insurance Company,
[fol. 29] Firemen's Fund Insurance Company,
Globe & Rutgers Fire Insurance Company,
Great American Insurance Company,
Home Insurance Company,
Insurance Company of North America,
Norwich Union Fire Insurance Company,
Phoenix Insurance Company,
Providence-Washington Insurance Company,
Royal Insurance Company,
Sea Insurance Company,
Standard Marine Insurance Company,

Thames & Mersey Marine Insurance Company,
Union Insurance Society of Canton, Ltd.,
Union Marine Insurance Company,
Universal Insurance Company,
United States Fire Insurance Company,
United States Merchants & Shippers Insurance Company.

Second. The Submarine Boat Corporation and Transmarine Corporation are corporations organized and existing under and by virtue of the laws of the State of New Jersey and at the times hereinafter mentioned were respectively owner and operating agent of the steamship "Sucarseco". Henry R. Sutphen and Irving Trust Company were appointed Receivers for the Submarine Boat Corporation in an action in equity in the United States District Court for the Southern District of New York, entitled Hazlemont Corporation against Submarine Boat Corporation, by order of Honorable Alfred C. Coxe, Jr., District Judge, dated January 3, 1930, which order was extended by order dated [fol. 30] January 13, 1930, extending the receivership to include the Transmarine Corporation. Said Receivers duly qualified and are now acting as Receivers for the Submarine Boat Corporation and Transmarine Corporation.

Third. On the night of November 22, 1928, the steamship "Toluma" was proceeding from Norfolk, Virginia, to Bahia Blanca, loaded with general cargo. The weather was clear. It was moonlight and visibility was good. The "Toluma" was proceeding on a southeasterly course when the lights of a vessel, which later proved to be the steamship "Sucarseco", were sighted broad on the "Toluma's" port bow on a crossing course. The "Toluma" sounded a signal of one blast. The "Sucarseco" sounded a signal of two blasts. The S. S. "Sucarseco" was so negligently navigated that the starboard quarter of the "Sucarseco" came into collision with the port bow of the "Toluma", causing serious damage to the "Toluma". After the collision, it was found that the "Toluma" was leaking and she returned to Norfolk where, after discharging cargo, repairs were effected. Cargo was thereafter again laden on board and the ship proceeded to her destination. Upon delivery of the cargo at destination the shippers, consignees, or owners, were required to give, and did give, to the general average adjusters, general average bonds and the above-

named insurance companies insuring said cargo gave general average guarantees by which they agreed to pay any proper general average charges due with respect to said cargo.

Fourth. The aforesaid collision and the damages resulting therefrom were not caused or contributed to by your [fol. 31] libellants or by any persons for whom they were responsible, but were caused solely by fault and neglect on the part of the agents and servants of respondents in charge of the steamship "Sucarseco", in the following respects, among others, which will be brought out at the trial of this case:

1. In that those in charge of the steamship "Sucarseco" were incompetent and inattentive to their duties.

2. In that they did not keep a good lookout.

3. In that although the steamship "Toluma" was on the starboard hand of the steamship "Sucarseco" in a crossing situation, they did not maneuver to keep out of the way of the steamship "Toluma".

4. In that they did not port the helm of the "Sucarseco" seasonably and pass under the stern of the "Toluma", but attempted to pass ahead of the "Toluma".

5. In that they did not slacken her speed or stop or reverse her engines in time.

6. In that they did not blow proper signals.

7. In that they violated the statutory rules of navigation applicable to the situation.

8. In that they did nothing to avoid the collision.

Fifth. As a result of said collision and the consequent necessary discharge of cargo to permit repairs to the [fol. 32] S. S. "Toluma" to enable that vessel to continue her voyage, considerable damage was sustained by the cargo through extra handling. Certain expenses of a general average nature were also made and incurred for and on behalf of the ship and cargo, the sum necessary to pay the same being advanced by the shipowner in consideration of a commission of 2½% upon the disbursements, and upon security furnished by cargo interests for their share.

Messrs. Johnson & Higgins, of New York, average adjusters, were duly appointed to prepare, and did prepare and issue under date of September 24, 1929, a statement of general and particular average, adjusting and apportioning between vessel and cargo interests the general average disbursements as well as general average allowances made to vessel and cargo interests, all directly and necessarily caused by and resulting from the collision. In accordance with said general average adjustment, and pursuant to the terms of their general average bonds and guarantees given as aforesaid, your libellants as owners, shippers, consignees, guarantors and/or insurers, have been required to pay, and have paid to the adjusters their proper proportions of the general average in the total sum of approximately $45,000.00. Such payments of their proper proportions of the general average constitute legal damage sustained by the owners, shippers and/or consignees of said cargo by reason of the matters and things aforesaid. The above-named insurance companies, by reason of their payments as aforesaid, have become subrogated to the rights of the owners, shippers and/or consignees of said cargo against the S. S. "Sucarseco" and her owners and operators.

[fol. 33] Sixth. By reason of the premises, your libellants have sustained damage in the sum of approximately Forty Five Thousand and 00/100 ($45,000.00) Dollars, no part of which has been paid, although payment has been duly demanded.

Seventh. All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, libellants pray that process in due form of law, according to the course and practice of this Honorable Court in causes of Admiralty and Maritime jurisdiction, issue against Henry R. Sutphen and Irving Trust Company, Receivers for Submarine Boat Corporation and Transmarine Corporation, the respondents herein, and that the said respondents be cited to appear and answer all and singular the matters aforesaid, and that this Honorable Court be pleased to decree to your libellants their damages, with interest and costs, and that your libellants may have

such other and further relief as in law and justice they may be entitled to receive.

Bigham, Englar, Jones & Houston, Proctors for Libellants, Office and P. O. Address, No. 64 Wall Street, Borough of Manhattan, New York City.

[fol. 34] *Duly sworn to by William Simonson. Jurat omitted in printing.*

In United States District Court

Answer of Henry R. Sutphen et ano. to Amended Libel of West India Oil Company et al.

To the Honorable the Judges of the United States District Court for the Southern District of New York:

The answer of Henry R. Sutphen and Irving Trust Company, Receivers for Submarine Boat Corporation and Transmarine Corporation, to the libel and complaint of West India Oil Company et al. against Henry R. Sutphen and Irving Trust Company, Receivers for Submarine Boat [fol. 35] Corporation and Transmarine Corporation, respectfully shows to this Honorable Court as follows:

First. Respondents deny that they have any knowledge or information sufficient to form a belief as to the allegations contained in Article First of the libel.

Second. As to Article Second of the libel, respondents admit that Submarine Boat Corporation is a corporation of the State of New York, and Transmarine Corporation is a corporation of the State of New Jersey, and admit all the other allegations contained in Article Second of the libel.

Third. Upon information and belief, respondents deny each and every allegation contained in Article Third of the libel except in so far as the same are expressly modified or admitted in Article Ninth of this answer.

Fourth. Respondents deny each and every allegation contained in Article Fourth of the libel.

Fifth. Respondents deny that they have any knowledge or information sufficient to form a belief as to the allegations contained in Article Fifth of the libel.

Sixth. Respondents deny each and every allegation contained in Article Sixth of the libel.

Seventh. As to Article Seventh of the libel, respondents admit the admiralty and maritime jurisdiction of the United States and of this Honorable Court, but deny the other allegations of Article Seven.

[fol. 36] Further Answering the Libel Herein Respondents Allege Upon Information and Belief That the True Facts and Circumstances are as Follows:

Eight. Respondents reallege Articles First to Seventh, inclusive, with the same force and effect as if the same were set forth in detail.

Ninth. On the evening of November 22, 1928, while the Steamship "Sucarseco", with a general cargo from New York destined for Pacific Coast ports, via the Panama Canal, was southeast of Cape Henry, with running lights properly set and burning brightly, and all officers and members of her crew at their respective and proper stations, weather fair, sea smooth, visibility high, those in charge of her observed abaft her starboard beam the port side light and well opened range lights of a vessel that subsequently proved to be the Steamship "Toluma."

The "Toluma" came up on the "Sucarseco" on a parallel course on which, if held, the "Toluma" would have overtaken and left the "Sucarseco" on her own port side with a wide margin of safety. The "Sucarseco" held her course and speed. When the "Toluma" came up to a position just forward of the "Sucarseco's" starboard beam, the "Toluma" was perceived to converge toward the "Sucarseco", at which juncture the "Toluma" blew a signal of one short blast on her whistle, indicating to those on board the "Sucarseco" that the "Toluma" was altering her course to her own starboard and away from the "Sucarseco", and in reliance thereon the "Sucarseco" held her course.

[fol. 37] The "Toluma", instead of altering her course to her own starboard pursuant to her signal whistle of one blast as aforesaid, suddenly and without warning swung to port toward the "Sucarseco". The "Sucarseco" thereupon immediately starboarded her helm and sounded two blasts on her whistle, indicating to those on the "Toluma"

that she was directing her course to port and away from the "Toluma" in an endeavor to avert collision. When it was apparent that collision was imminent, those in charge of the "Sucarseco" put her helm hard aport, thereby causing the stern of the "Sucarseco" to swing away from the oncoming "Toluma", which maneuver, although unsuccessful in averting collision, lessened considerably the force of the blow of the "Toluma's" port bow as it came into contact with the starboard side of the "Sucarseco" in the way of her No. 4 hold, causing considerable damage to the "Sucarseco" and to her cargo.

Tenth. The said collision and subsequent damage, if any, to the Steamship "Toluma" and her cargo, were not caused or contributed to by any fault, neglect or want of care on the part of the respondents or those in charge of the Steamship "Sucarseco", but were due solely to the fault, neglect and want of care on the part of the Steamship "Toluma" or those in charge thereof in the following, among other particular, which will be pointed out at the trial of this suit:

1. In that those in charge of the "Toluma" were incompetent and inattentive to their duties.

2. In that those in charge of the "Toluma" failed and [fol. 38] neglected to station and maintain a proper and efficient lookout.

3. In that the "Toluma" being the overtaking vessel failed to keep off and away from the "Sucarseco".

4. In that those in charge of the "Toluma" failed to hold her to her course while she was overtaking and passing the "Sucarseco".

5. In that those in charge of the "Toluma" failed to keep her off and away from the "Sucarseco".

6. In that those in charge of the "Toluma" failed and neglected to navigate in accordance with the one blast whistle signal which they blew to the "Sucarseco".

7. In that those in charge of the "Toluma" negligently starboarded her helm instead of porting her helm when she blew the one blast whistle signal to the "Sucarseco".

8. In that those in charge of the "Toluma", after she had attempted to overtake and pass the "Sucarseco" on the

"Sucarseco's" starboard hand, without warning, negligently altered her course to port.

9. In that those in charge of the "Toluma" failed to seasonably do anything to avoid collision when risk of collision was, or should have been, apparent.

Wherefore, respondents pray that the libel herein be dis- [fol. 39] missed with costs, and that they may have such other and further relief as to the Court may seem just and proper.

Single and Single, White & Case, Proctors for Respondents Henry R. Sutphen and Irving Trust Company, Receivers for Submarine Boat Corporation and Transmarine Corporation, Office and P. O. Address, 15 William Street, Borough of Manhattan, City of New York.

Duly sworn to by Henry R. Sutphen. Jurat omitted in printing.

[fol. 40] IN UNITED STATES DISTRICT COURT

AKTIESELSKABET CUZCO, Owner of the Steamship "TOLUMA", Libellant,

against

Steamship "SUCARSECO", her engines, boilers, etc., and SUBMARINE BOAT CORPORATION, Claimants

(and Two Other Cases)

ORDER AMENDING AMENDED LIBEL OF WEST INDIA OIL COMPANY ET AL.—Aug. 5, 1933

On the subjoined consent signed by the proctors for the respective parties hereto and on motion of Bigham, Englar, Jones & Houston, proctors for cargo libellants, it is

Ordered that the amended libel of West India Oil Company, J. H. Senior, Agent, American Insurance Company, et al., be further amended by including in the title and in [fol. 41] paragraph First thereof among the named libellants the following additional libellants: The Texas Company and L. L. Jacobs. And it is further

Ordered that the foregoing is without prejudice to all proceedings heretofore taken in the above entitled consolidated cause and that cause shall proceed as if the aforenamed new libellants had been original libellants named in the libel of West India Oil Company, et al.

Alfred C. Coxe, U. S. D. J.

Consented to:

Single, Atkins, Middleton & Tyler, Proctors for Submarine Boat Corporation and Henry R. Sutphen and Irving Trust Company, as Receivers for Submarine Boat Corporation and Transmarine Corporation. Kirlin, Campbell, Hickox, Keating & McGrann, Proctors for Atkieselskabet Cuzco, Libellant and Claimant.

[fol. 42] IN UNITED STATES DISTRICT COURT

101-148

[Title omitted]

103-152

[Title omitted]

[fol. 43] IN UNITED STATES DISTRICT COURT

106-172

[Title omitted]

ORDER OF CONSOLIDATION AND SUBMISSION UPON AN AGREED STATEMENT OF FACTS—Feb. 23, 1933

A collision having occurred between the Norwegian steamship "Toluma" and the American steamship "Sucarseco" at sea on the night of November 22, 1928, resulting in certain damage to each vessel and to the cargo on board the steamship "Toluma"; and the first above entitled libel having been thereafter filed by the owners of the "Toluma" against the "Sucarseco"; and the second above entitled cross-libel having been thereafter filed by

the owners and charterers of the "Sucarseco" against the "Toluma", her owners and agents; and the third above entitled libel having been filed by the owners, shippers, consignees, guarantors and/or insurers of cargo on the steamship "Toluma" against the receivers of the owners and charterers respectively of the steamship "Sucarseco" by permission of this court granted in its order entered on or about December 26, 1930, in the equity suit of Max Doyne and Hazelmont Corporation, complainants, against Submarine Boat Corporation and Transmarine Corpora-[fol. 44] tion, defendants; and leave having heretofore been granted by this court by an order entered in the said equity suit, dated April 29, 1931, to consolidate the above entitled libels and cross-libels all relating to said collision between the steamship "Toluma" and the steamship "Sucarseco"; and the parties to said actions by their respective proctors having agreed that the collision described in said libels and cross-libel and the damages resulting therefrom were caused jointly and equally by faults or errors in navigation of the steamship "Sucarseco" and the steamship "Toluma", and those in charge of the navigation of the said steamships, and that the said collision and damages resulting therefrom were not caused or contributed to by unseaworthiness of the said vessels, nor by lack of due diligence on the part of the respective owners thereof to make the said vessels seaworthy in all respects; and the said parties and their respective proctors having entered into a stipulation of agreed facts hereto annexed, but being unable to agree as to the rights of recoveries and/or amounts due and/or property allowable among the respective parties hereto, and as the proper distribution of the said amounts, as matter of law; and, furthermore, the said parties and their respective proctors having agreed that the said questions of law be submitted to this court in this consolidated cause, upon the said agreed statement of facts;

Now, on the subjoined consents, it is by the court.

[fol. 45] Ordered that the above entitled actions be and they hereby are consolidated, and shall hereafter proceed as one cause under the following caption:

"Aktieselskabet Cuzco, Owner of the Steamship 'Toluma', Libellant,

against

Steamship 'Sucarseco', Her Engines, Boilers, etc., and Submarine Boat Corporation, Claimants

(and Two Other Cases)"

and it is further

Ordered that this order of consolidation shall not alter in any way the rights of any party hereto with respect to any security which may have been obtained by any of the parties in any of the suits above entitled; and it is further

Ordered that nothing herein contained shall prejudice or vary the right of any party to institute and maintain limitation of liability proceedings; and it is further

Ordered that the consolidated cause be and the same hereby is submitted to this court for determination and decree upon all the pleadings and stipulations in the several libels and cross-libel above entitled, and upon the subjoined stipulation of agreed facts and the documents referred to in paragraph 6 thereof.

Robert P. Patterson, U. S. D. J.

[fol. 46] We hereby consent to the entry of the foregoing order.

Dated New York, February 23, 1933.

Kirlin, Campbell, Hickox, Keating & McGrann, Proctors for S. S. "Toluma", Aktieselskabet Cuzco, and Grace Line, Inc.

Single and Single, Proctors for S. S. "Sucarseco", Submarine Boat Corporation, and Henry R. Sutphen and Irving Trust Company, Receivers for Submarine Boat Corporation and Transmarine Corporation.

Bigham, Englar, Jones & Houston, Proctors for Libelants, West India Oil Company, et al. ("Toluma" cargo).

[fol. 47] In United States District Court, Southern District of New York

Aktieselskabet Cuzco, Owner of the Steamship "Toluma," Libelant,

against

Steamship "Sucarseco," Her Engines, Boilers, etc., and Submarine Boat Corporation, Claimants

(and Two Other Cases)

Stipulation of Agreed Facts

It is hereby stipulated and agreed:

1. That the collision of November 22, 1928, between the S. S. "Sucarseco" and the S. S. "Toluma" was caused jointly and equally by the fault or errors in navigation of the steamship "Sucarseco" and the steamship "Toluma," and those in charge of the navigation of the said steamships, and that the said collision and damages resulting therefrom were not caused or contributed to by unseaworthiness of the said vessels, nor by lack of due diligence on the part of the respective owners thereof to make the said vessels seaworthy in all respects.

2. That the following items of damage only are deemed to have been caused by the collision and to be provable, proved and allowed in this consolidated cause, without interest and without costs up to the date of this stipulation, but interest to run on the principal sums thereof from the date of this stipulation, and the costs of the respective parties hereafter accruing to be apportioned in accordance [fol. 48] with the practice of this Court; recovery of said items of damage to be awarded to and against the respective parties hereto to such an extent and in such proportions as may be determined by the decision of this Court, or an appellate court, in the event of appeal, to be in accordance with the respective rights of the parties, under the agreed circumstances of this case as herewith submitted:

(a) The owners of the S. S. "Sucarseco" disbursed the sum of $10,889.46, by reason of necessary repairs and

expenses in connection therewith, and were damaged in the further sum of $4,000, by reason of the detention of .the vessel, and may be further damaged to the extent of the amount which West India Oil Company et al., the cargo libelants herein, may recover by reason of the claims for damages asserted by the said cargo libelants, in the libel of the said cargo libelants against Henry R. Sutphen and Irving Trust Company, receivers for Submarine Boat Corporation and Transmarine Corporation, as respondents, or otherwise, consisting of proportions of general average paid by the said cargo libelants as shown to be due as contributions from the said cargo libelants in the general average statement issued by Johnson & Higgins, average adjusters, dated New York, September 24, 1929.

(b) The owners of the S. S. "Toluma" disbursed the sum of $64,337.63, by reason of necessary repairs and expenses due to the collision, and were damaged in the further sum of $16,453.20, by reason of the detention of the vessel.

(c) The cargo on board the S. S. "Toluma" sustained physical damage in the sum of $2,956.89, all of which was of a general average nature and itemized as such in said [fol. 49] adjustment at pages 120 to 129 thereof, inclusive.

3. That a certain portion (as shown in par. 4) of the disbursements and damages of the owners of the S. S. "Toluma," set forth in paragraph 2 (b), and all of the physical damage of the "Toluma" cargo, set forth in paragraph 2 (c) were of a general average nature and were among others stated in a general average adjustment issued by Johnson & Higgins, average adjusters, dated New York, September 24, 1929.

4. (a) That of the disbursements of the owners of the "Toluma" totaling $64,337.63, set forth in paragraph 2 (b) hereof, a total of $35,828.45 was stated in said adjustment as general average in the particular amounts shown in the items numbered 1 to 62 inclusive, 65 to 71 inclusive, and 73 to 95 inclusive.

(b) That the detention damage totaling $16,453.20, sustained by the owners of the S. S. "Toluma" as set forth in paragraph 2 (b) hereof, included certain items of laid up and running expenses during repairs which were of a general average nature and were stated as such in said ad-

justment at the following pages thereof and in the following amounts:

Page	Amount
133	$4,097.98
	25.32
135	371.20
Total	$4,494.50

5. That of the amounts heretofore stated as disbursements and/or expenses, and/or damages, of the "Toluma" [fol. 50] and her owner, and of cargo on the "Toluma" and owners thereof respectively, in 2 (b) and 2 (c) herein, the total sum of $43,279.84 is of a general average nature, and so stated in the general average adjustment mentioned in paragraph 3 above; and, in accordance with the contributing values of the Vessel interests ("Toluma" and owner), and the Cargo interests, shown on pages 144 and 145 of the said general average adjustment, the apportionment of the said sum of $43,279.84, for contribution in general average is in the sum of $3,885.83 from the "Toluma" and her owner, and in the sum of $39,394.01 from Cargo on the "Toluma" and owners thereof.

6. That this consolidated cause is to be submitted on the following further evidence:

(a) A copy of the form of bills of lading constituting the contract of affreightment and carriage between the shipper or the agent of the owner of the property carried on the S. S. "Toluma" and the said S. S. "Toluma," including all clauses therein forming the conditions and terms of the said contract.

(b) A copy of said general average statement of Johnson & Higgins, average adjusters, dated New York, September 24, 1929, with certain items numbered to facilitate reference thereto in this stipulation, which is to be taken as true evidence of all the facts therein set forth, including statements of master, survey reports, statements of charges, expenses, allowances, etc. (except as modified by this stipulation), it being further agreed that the general average has been duly and properly apportioned by said adjusters according to York-Antwerp Rules of 1890, and as [fol. 51] to matters not therein provided for according to

the laws and usages at the port of New York, and the practice of average adjusters and that some of the cargo libelants as owners, shippers, consignees, guarantors or insurers have paid to the adjusters the full proportions of general average shown to be due with respect to certain shipments of cargo according to said statement and that the amounts paid by each may be further shown upon a reference, or in such other manner as may be authorized by the Court.

(c) A copy of the form of general average bond and of the form of general average guaranty taken by the adjusters from the various consignees of cargo and/or underwriters in this case.

Dated New York, February 23, 1933.

Kirlin, Campbell, Hickox, Keating & McGrann, Proctors for S. S. "Toluma," Aktieselskabet Cuzco, and Grace Line, Inc.

Single & Single, Proctors for S. S. "Sucarseco," Submarine Boat Corporation, and Henry R. Sutphen and Irving Trust Company, Receivers for Submarine Boat Corporation and Transmarine Corporation.

Bigham, Englar, Jones & Houston, Proctors for Libelants, West India Oil Company et al. ("Toluma" Cargo).

[fol. 52] BILL OF LADING SUBMITTED WITH STIPULATION OF AGREED FACTS

(Photoprint)

[For the convenience of Court and Counsel this Exhibit (photostatic copy) is bound in on the opposite page.]

The following extract from paragraph 12 of the exhibit is the provision referred to as the Jason Clause:

"In case of danger, damage or disaster resulting from accident or from faults or errors in navigation or in the management of or from any latent or other defect of the vessel, her machinery or appurtenances, from unseaworthiness, even though existing at the time of shipment or at

the beginning of the voyage, if the defect or unseaworthiness was not discoverable by the exercise of due diligence and if the ship-owner shall have exercised due diligence to make the vessel seaworthy and properly manned, equipped and supplied with respect to the matters concerned in the aforesaid danger, damage or disaster, then the shippers, consignees or owners of the cargo or the holders of this bill of lading shall nevertheless pay salvage and any special charges incurred in respect of the cargo and shall contribute with the shipowners in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred for the common benefit or to relieve the adventure of any common peril, all with the same force and effect and to the same extent as if such accident, danger, damage or disaster had not resulted from or been occasioned by faults or errors in navigation or in the management of the vessel or by any latent or other defect or unseaworthiness."

(Here follows photolithograph, side folio 53.)

G. L. 2309

GRA

10 HANOVER
for WEST COA

Should the ship named in this bill of lading be a motor

Received, in apparent good order and con
by the American Steamship named on the reverse side h
of New York, for carriage to the port named on the rev
port to proceed to, and stay at, any ports or places what
said port of discharge), once or oftener, in any order, ba
purpose whatsoever, and also to proceed via Straits of M
be deemed included within the intended voyage; this lib
written or printed, with liberty to carry goods of all ki
marked and numbered as on the reverse side hereof (we
tackles in like order and condition at the port named on
detention or delay), unto the consignee named on the r
if any incurred.

☞ *NOTICE—This Bill of Lading constitutes the contr
carried and the "Grace Line."*

1. The goods to be discharged from the ship as soon as sh
agents of the vessel, at the risk and expense of the owners of the
2. It is hereby expressly agreed that the freight having be
without recovery, upon receipt of the goods into the custody of t
hereinafter mentioned the said steamship is to have the right to fo
receive extra compensation for such service, whether performed by
aforesaid merchandise or treasure during the voyage by a vessel o
vessels belonged to strangers.
3. It is mutually agreed that the ship shall have liberty to
vessels in all situations, to deviate for the purpose of saving life o
any cause from commencing with or proceeding in the ordinary co
ship, that the carrier is authorized to forward or transship the good
4. It is also mutually agreed that the carrier shall not be li
other waters, by fire from any cause or wheresoever occurring; by
princes, rulers or people; riots, strikes or stoppages of labor; by ex
appurtenances, by collisions, stranding, or other accidents of navig
judgment of the pilot, master, mariners or other servants of the ship
ship or any of them, or by the ship's husband or manager; by unse
the owners have exercised due diligence to make the vessel seaworth
acter, drainage, leakage, breakage, vermin, nor for damage or deter
nature of the goods or the insufficiency of packages; nor for land d
addressees or descriptions, nor for risk of craft, bulk or transshipme
of any kind to articles perishable in their nature; and that the carr
weight, contents and value.
5. The freight on the cargo carried hereunder is regulated
cargo. Unless a higher value shall be declared and written in this
eral cargo shall be taken to be not more than $100, or in case of hou
case of bulk cargo, $200 per freight ton; and in case of total loss o
respectively, not exceeding the invoice value in any case. Any part
the amounts above indicated, respectively, or on the invoice value,
the difference between the damaged value and the value hereinabove
of the goods, or the holder of this bill of lading, the shipowner shall
on behalf of the insurers thereof, whether under the guise of advan
6. Also, that shippers shall be liable for any loss or damage
full disclosure of their nature whether such shipper be principal or
compensation.
7. Also, that the carrier shall have a lien on the goods for all
or suffer by reason of the incorrect or insufficient marking, numberi
impost, of whatever nature, levied upon the steamer, by the authorities
8. This cargo is received on the express condition that if it
port for which they are intended, whether through Custom House
war, strike, lockout, labor troubles, disturbances, blockade or interd
whatsoever which the carrier cannot remedy, the Master is to have
consider safe, or of retaining same on board until the steamer's retu
compensation over and above the amount of prepaid freight, as per th
port of destination; or of transshipping same at any other port he
or consignee of the goods; such discharge or transshipment shall be
addressed to the shipper, or consignee if named in bill of lading, sta
this option may be availed of by Master at any time, either before co
thereon for all extra expenses incurred in consequence; and the carri
without notice, to transship the goods, at the carrier's expense, but at
vessel, steam or sail, whether owned or employed by the said line. It
have the option of requiring consignees to furnish lighters to take de
9. Also, that the Master of the vessel has the right of hiring
risk of the owners of said goods; and if [illegible]
shall cease [illegible]

CAREFULLY READ THIS BILL OF LADING

relative to the restrictions, fines and penalties imposed on any person or persons
owning, Turpentine, Nitro-Glycerine, Camphor, Petroleum or its products. Nitric or

Bill of Lading Submitted With Stipulation of Agreed Facts.

G. L. 2309

GRACE LINE

10 HANOVER SQUARE, NEW YORK

for WEST COAST of SOUTH AMERICA

Should the ship named in this bill of lading be a motor vessel, the word "Steamship" will be held to cover and include the term "Motor V

Received, in apparent good order and condition, from the Shippers named on the reverse side hereof, to be transported by the American Steamship named on the reverse side hereof and/or any other Steamship of the line now at or proceeding to the port of New York, for carriage to the port named on the reverse side hereof, but with liberty either before or after proceeding towards that port to proceed to, and stay at, any ports or places whatsoever (although in a contrary direction to, or out of, or beyond, the route to the said port of discharge), once or oftener, in any order, backwards or forwards, for loading or discharging cargo or passengers, or for any purpose whatsoever, and also to proceed via Straits of Magellan, Cape Horn or Panama Canal, and all such ports, places and sailings shall be deemed included within the intended voyage; this liberty is not to be considered as restricted by any words in this contract, whether written or printed, with liberty to carry goods of all kinds whether on deck or under deck and whether dangerous or otherwise; being marked and numbered as on the reverse side hereof (weight, quality, contents and value unknown): and to be delivered from the ship's tackles in like order and condition at the port named on the reverse side hereof (or so near thereto as the vessel may safely get without detention or delay), unto the consignee named on the reverse side hereof, or to his or their assigns, they paying average accustomed if any incurred.

☞ *NOTICE—This Bill of Lading constitutes the contract, between the shipper or the agent of the Owner of the property carried and the "Grace Line."*

1. The goods to be discharged from the ship as soon as she is ready to unload into lighter, hulk, temporary depot, or lazaretto, if necessary, by the agents of the vessel, at the risk and expense of the owners of the goods.

2. It is hereby expressly agreed that the freight having been prepaid by the shippers, became wholly due, and belonged absolutely to the steamer, without recovery, upon receipt of the goods into the custody of the said steamer, ship lost or not lost; and on the happening of any of the contingencies hereinafter mentioned the said steamship is to have the right to forward the above mentioned packages to the port of destination on its own route, and shall receive extra compensation for such service, whether performed by the vessels of this line or those of strangers; and in case of salvage services rendered to aforesaid merchandise or treasure during the voyage by a vessel of the said line, such salvage services shall be paid for as fully as if such salving vessel or vessels belonged to strangers.

3. It is mutually agreed that the ship shall have liberty to sail without pilots; to carry goods of all kinds, dangerous or otherwise, to tow and assist vessels in all situations, to deviate for the purpose of saving life or property; it is also agreed, should the ship put into a port of refuge, or be prevented from any cause from commencing with or proceeding in the ordinary course of her voyage, or should the goods or any part of them be shut out from said steamship, that the carrier is authorized to forward or transship the goods to their destination by any other vessel, steam or sail at shipper's risk.

4. It is also mutually agreed that the carrier shall not be liable for loss or damage occasioned by causes beyond his control, by the perils of the sea or other waters, by fire from any cause or wheresoever occurring; by barratry of the master or crew, by enemies, pirates or robbers, by arrest and restraint of princes, rulers or people; riots, strikes or stoppages of labor; by explosion, bursting of boilers, breakage of shafts, or any latent defect in hull, machinery or appurtenances, by collisions, stranding, or other accidents of navigation, of whatsoever kind, even when occasioned by the negligence, default or error in judgment of the pilot, master, mariners or other servants of the shipowner, not resulting, however, in any case from want of due diligence by the owners of the ship or any of them, or by the ship's husband or manager; by unseaworthiness of the ship, even existing at time of shipment or sailing on the voyage, provided the owners have exercised due diligence to make the vessel seaworthy; nor for heating, effects of climate, heat of hold, putrefaction, rust, sweat, change of character, drainage, leakage, breakage, vermin, nor for damage or deterioration caused by fumigation or disinfection, or any loss or damage arising from the nature of the goods or the insufficiency of packages; nor for land damage; nor for the obliteration, errors, insufficiency of, or absence of marks, numbers, addresses or descriptions, nor for risk of craft, hulk or transshipment; nor for any loss or damage caused by the prolongation of the voyage, nor for damage of any kind to articles perishable in their nature; and that the carrier shall not be concluded as to the correctness of statement herein of quantity, quality, weight, contents and value.

5. The freight on the cargo carried hereunder is regulated in consideration of all the terms of this contract and is based partly on the value of the cargo. Unless a higher value shall be declared and written in this bill of lading and freight paid thereon accordingly, the valuation of each package of general cargo shall be taken to be not more than $100, or in case of household goods or personal effects, not more than $5.00 for every 100 pounds, or in the case of bulk cargo, $200 per freight ton; and in case of total loss or short delivery, the shipowner shall not be liable for more than the amounts so indicated respectively, not exceeding the invoice value in any case. Any partial loss or damage for which the shipowner may be liable shall be adjusted pro rata on the amounts above indicated, respectively, or on the invoice value, whichever shall be the least. The shipowner shall not be liable in any event for more than the difference between the damaged value and the value hereinabove agreed. Insofar as the shipowner may be held liable to the owner, shipper, or consignee of the goods, or the holder of this bill of lading, the shipowner shall be entitled to the benefit of any insurance on the goods and to any payments made by or on behalf of the insurers thereof, whether under the guise of advances, loans or in any other manner whatsoever.

6. Also, that shippers shall be liable for any loss or damage to ship or cargo caused by inflammable, explosive or dangerous goods, shipped without full disclosure of their nature whether such shipper be principal or agent; and that such goods may be thrown overboard or destroyed at any time without compensation.

7. Also, that the carrier shall have a lien on the goods for all freight and charges and also for all fines or damage which the ship or cargo may incur or suffer by reason of the incorrect or insufficient marking, numbering and addressing of packages, or description of their contents; or for any duty, tax or impost, of whatever nature, levied upon the steamer, by the authorities at the Port of Discharge, for or in connection with the goods herein described.

8. This cargo is received on the express condition that if it should be impracticable or unsafe in the opinion of the master to land the goods at the port for which they are intended, whether through Custom House not being able to receive it, through weather, earthquake, epidemic, quarantine, riot, war, strike, lockout, labor troubles, disturbances, blockade or interdict,, congestion of port, lack of launches or other elements of discharge or for any cause whatsoever which the carrier cannot remedy, the Master is to have the option of discharging all or any part of the goods at any other port which he may consider safe, or of retaining same on board until the steamer's return trip, in which case steamer shall be entitled, for such extra service, to a reasonable compensation over and above the amount of prepaid freight, as per this bill of lading; or of transferring same to hulks, craft or other vessel, steam or sail, in port of destination; or of transshipping same at any other port he or the steamer's agent may think convenient, at risk and expense of the shipper, owner or consignee of the goods; such discharge or transshipment shall be deemed final delivery under this contract, and upon a letter being put into the post office addressed to the shipper, or consignee if named in bill of lading, stating such discharge or transshipment the carrier shall be relieved from all responsibility; this option may be availed of by Master at any time, either before commencing or during process of discharge, and such goods shall be liable and a lien held thereon for all extra expenses incurred in consequence; and the carrier shall have the right under any and all other circumstances or at their option, and without notice, to transship the goods, at the carrier's expense, but at the shipper's risk, at the port of shipment, or at any intermediate port, by any other vessel, steam or sail, whether owned or employed by the said line. It is also agreed that the Master or agents of the steamer at the port of destination shall have the option of requiring consignees to furnish lighters to take delivery of the within described merchandise.

9. Also, that the Master of the vessel has the right of hiring lighters at the port of destination for the landing of the within goods at the expense and risk of the owners of said goods; and if this in his judgment is inexpedient, the goods to be taken from the ship's tackles where the ship's responsibility shall cease, and to be taken from alongside by the consignee immediately the vessel is ready to discharge, or otherwise they will be landed by the Master at the expense of the consignee, and at his risk of fire, loss or injury, as the authorities at the port of discharge shall direct. If by reason of lack of lighters, cars or discharging facilities of any nature whatsoever, in the Master's opinion, the vessel is likely to be detained beyond the time required under ordinary circumstances to discharge the within goods, he is at liberty to proceed on his voyage with the whole or any portion of the within goods remaining on board, to be discharged on steamer's return trip subject to the payment of a reasonable compensation in the same manner as provided in clause 8 of this bill of lading, or at the option of the Master to forward them to destination from the first convenient port he may subsequently call at, at the risk and expense of the consignees, and the carrier shall not be responsible for damage or loss as the consequence thereof.

10. Also, that if any bags of grain, flour, coffee, cocoa, or similar cargo be landed slack or torn, the consignee shall accept such proportion of the sweepings as shall be allotted by the agents of the carrier and the same shall be deemed a full settlement of any claim for loss in weight.

11. Also, that the shippers are hereby notified that this and all steamers of this line carry general cargo for all ports, including explosives, kerosene oil and products of petroleum, spirits of turpentine, and other flam[illegible]

TED TO CAREFULLY READ THIS BILL OF LADING

tes of Congress relative to the restrictions, fines and penalties imposed on any person or persons ime, Matches, Powder, Turpentine, Nitro-Glycerine, Camphor, Petroleum or its products. Nitric or

SHIPPERS ARE REQUESTED TO CAREFULLY READ THIS BILL OF LADING

☛ NOTICE—The attention of Shippers is called to the Acts of Congress relative to the restrictions, fines and penalties imposed on any person or persons shipping or attempting to ship Oil of Vitrol, Unslacked Lime, Matches, Powder, Turpentine, Nitro-Glycerine, Camphor, Petroleum or its products, Nitric or Chemical Acids, or other articles of like character.

1. The goods to be discharged from the ship as soon as she is ready to unload into lighter, hulk, temporary depot, or lazaretto, if necessary, by the agents of the vessel, at the risk and expense of the owners of the goods.

2. It is hereby expressly agreed that the freight having been prepaid by the shippers, became wholly due, and belonged absolutely to the steamer, without recovery, upon receipt of the goods into the custody of the said steamer, ship lost or not lost; and on the happening of any of the contingencies hereinafter mentioned the said steamship is to have the right to forward the above mentioned packages to the port of destination on its own route, and shall receive extra compensation for such service, whether performed by the vessels of this line or those of strangers; and in case of salvage services rendered to aforesaid merchandise or treasure during the voyage by a vessel of the said line, such salvage services shall be paid for as fully as if such salving vessel or vessels belonged to strangers.

3. It is mutually agreed that the ship shall have liberty to sail without pilots; to carry goods of all kinds, dangerous or otherwise, to tow and assist vessels in all situations, to deviate for the purpose of saving life or property; it is also agreed, should the ship put into a port of refuge, or be prevented from any cause from commencing with or proceeding in the ordinary course of her voyage, or should the goods or any part of them be shut out from said steamship, that the carrier is authorized to forward or transship the goods to their destination by any other vessel, steam or sail at shipper's risk.

4. It is also mutually agreed that the carrier shall not be liable for loss or damage occasioned by causes beyond his control, by the perils of the sea or other waters, by fire from any cause or wheresoever occurring; by barratry of the master or crew, by enemies, pirates or robbers, by arrest and restraint of princes, rulers or people; riots, strikes or stoppages of labor; by explosion, bursting of boilers, breakage of shafts, or any latent defect in hull, machinery or appurtenances, by collisions, stranding, or other accidents of navigation, of whatsoever kind, even when occasioned by the negligence, default or error in judgment of the pilot, master, mariners or other servants of the shipowner, not resulting, however, in any case from want of due diligence by the owners of the ship or any of them, or by the ship's husband or manager; by unseaworthinessof the ship, even existing at time of shipment or sailing on the voyage, provided the owners have exercised due diligence to make the vessel seaworthy; nor for heating, effects of climate, heat of hold, putrefaction, rust, sweat, change of character, drainage, leakage, breakage, vermin, nor for damage or deterioration caused by fumigation or disinfection, or any loss or damage arising from the nature of the goods or the insufficiency of packages; nor for land damage; nor for the obliteration, errors, insufficiency of, or absence of marks, numbers, addresses or descriptions, nor for risk of craft, hulk or transshipment; nor for any loss or damage caused by the prolongation of the voyage, nor for damage of any kind to articles perishable in their nature; and that the carrier shall not be concluded as to the correctness of statement herein of quantity, quality, weight, contents and value.

5. The freight on the cargo carried hereunder is regulated in consideration of all the terms of this contract and is based partly on the value of the cargo. Unless a higher value shall be declared and written in this bill of lading and freight paid thereon accordingly, the valuation of each package of general cargo shall be taken to be not more than $100, or in case of household goods or personal effects, not more than $5.00 for every 100 pounds, or in the case of bulk cargo, $200 per freight ton; and in case of total loss or short delivery, the shipowner shall not be liable for more than the amounts so indicated respectively, not exceeding the invoice value in any case. Any partial loss or damage for which the shipowner may be liable shall be adjusted pro rata on the amounts above indicated, respectively, or on the invoice value, whichever shall be the least. The shipowner shall not be liable in any event for more than the difference between the damaged value and the value hereinabove agreed. Insofar as the shipowner may be held liable to the owner, shipper, or consignee of the goods, or the holder of this bill of lading, the shipowner shall be entitled to the benefit of any insurance on the goods and to any payments made by or on behalf of the insurers thereof, whether under the guise of advances, loans or in any other manner whatsoever.

6. Also, that shippers shall be liable for any loss or damage to ship or cargo caused by inflammable, explosive or dangerous goods, shipped without full disclosure of their nature whether such shipper be principal or agent; and that such goods may be thrown overboard or destroyed at any time without compensation.

7. Also, that the carrier shall have a lien on the goods for all freight and charges and also for all fines or damage which the ship or cargo may incur or suffer by reason of the incorrect or insufficient marking, numbering and addressing of packages, or description of their contents; or for any duty, tax or impost, of whatever nature, levied upon the steamer, by the authorities at the Port of Discharge, for or in connection with the goods herein described.

8. This cargo is received on the express condition that if it should be impracticable or unsafe in the opinion of the master to land the goods at the port for which they are intended, whether through Custom House not being able to receive it, through weather, earthquake, epidemic, quarantine, riot, war, strike, lockout, labor troubles, disturbances, blockade or interdict, congestion of port, lack of launches or other elements of discharge or for any cause whatsoever which the carrier cannot remedy, the Master is to have the option of discharging all or any part of the goods at any other port which he may consider safe, or of retaining same on board until the steamer's return trip, in which case steamer shall be entitled, for such extra service, to a reasonable compensation over and above the amount of prepaid freight, as per this bill of lading; or of transferring same to hulks, craft or other vessel, steam or sail, to port of destination; or of transshipping same at any other port he or the steamer's agent may think convenient, at risk and expense of the shipper, owner or consignee of the goods; such discharge or transshipment shall be deemed final delivery under this contract, and upon a letter being put into the post office addressed to the shipper, or consignee if named in bill of lading, stating such discharge or transshipment the carrier shall be relieved from all responsibility; this option may be availed of by Master at any time, either before commencing or during process of discharge, and such goods shall be liable and a lien held thereon for all extra expenses incurred in consequence; and the carrier shall have the right under any and all other circumstances or at their option, and without notice, to transship the goods, at the carrier's expense, but at the shipper's risk, at the port of shipment, or at any intermediate port, by any other vessel, steam or sail, whether owned or employed by the said line. It is also agreed that the Master or agents of the steamer at the port of destination shall have the option of requiring consignees to furnish lighters to take delivery of the within described merchandise.

9. Also, that the Master of the vessel has the right of hiring lighters at the port of destination for the landing of the within goods at the expense and risk of the owners of said goods; and if this in his judgment is inexpedient, the goods to be taken from the ship's tackles where the ship's responsibility shall cease, and to be taken from alongside by the consignee immediately the vessel is ready to discharge, or otherwise they will be landed by the Master at the expense of the consignee, and at his risk of fire, loss or injury, as the authorities at the port of discharge shall direct. If by reason of lack of lighters, care or discharging facilities of any nature whatsoever, in the Master's opinion, the vessel is likely to be detained beyond the time required under ordinary circumstances to discharge the within goods, he is at liberty to proceed on his voyage with the whole or any portion of the within goods remaining on board, to be discharged on steamer's return trip subject to the payment of a reasonable compensation in the same manner as provided in clause 8 of this bill of lading, or at the option of the Master to forward them to destination from the first convenient port he may subsequently call at, at the risk and expense of the consignees, and the carrier shall not be responsible for damage or loss as the consequence thereof.

10. Also, that if any bags of grain, flour, coffee, cocoa, or similar cargo be landed slack or torn, the consignee shall accept such proportion of the sweepings as shall be allotted by the agents of the carrier and the same shall be deemed a full settlement of any claim for loss in weight.

11. Also, that the shippers are hereby notified that this and all steamers of this line, carry general cargo for all ports, including explosives, kerosene oil and products of petroleum, spirits of turpentine, and other liquids in cans, cases, barrels or packages, without liability for any damage to other cargo resulting from leakage, smell, evaporation or other action of said goods.

12. General average shall be adjusted and payable according to York-Antwerp Rules of 1890 and Antwerp Rule of 1903, and as to matters not therein provided for, according to the laws and usages at the port of New York, or at shipowner's option, at last port of discharge. The general average in every instance shall be prepared by average adjusters selected by the shipowner, in case of danger, damage or disaster resulting from accident or from faults or errors in navigation or in the management of or from any latent or other defect of the vessel, her machinery or appurtenances, from unseaworthiness, even though existing at the time of shipment or at the beginning of the voyage, if the defect or unseaworthiness was not discoverable by the exercise of due diligence and if the shipowner shall have exercised due diligence to make the vessel seaworthy and properly manned, equipped and supplied with respect to the matters concerned in the aforesaid danger, damage or disaster, then the shippers, consignees or owners of the cargo or the holders of this bill of lading shall nevertheless pay salvage and any special charges incurred in respect of the cargo and shall contribute with the shipowners in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred for the common benefit or to relieve the adventure of any common peril, all with the same force and effect and to the same extent as if such accident, danger, damage or disaster had not resulted from or been occasioned by faults or errors in navigation or in the management of the vessel or by any latent or other defect or unseaworthiness. The shippers, consignees, owners of the cargo or holders of this bill of lading shall make a deposit in cash or give a satisfactory guaranty, as the shipowner or Master may determine, equivalent to the proportion of such charges that may be estimated by the shipowner or Master to become due from the cargo. Salvage services rendered to the goods by another vessel owned by or in the service of the shipowner shall be paid for as fully as if such vessel were owned by or in the service of strangers.

13. Also, if the steamer entrusts or delivers the aforesaid merchandise or treasure to any other vessel, steam or sail, or agent or other person, for the purposes of being FORWARDED to any port or place other than the regular ports in the customary route of this line, or to any port in said customary route at which the steamer may not call on her present voyage (which the steamer is hereby authorized to do), such company or person so selected shall be regarded exclusively as the agent of the shipper or owner, and such agent shall alone be liable; and the steamer shall not be, in any event, responsible for the negligence or non-performance of any such company or person; and the shipper and owner hereby severally agree that all stipulations, exceptions and conditions contained in this bill of lading shall extend to, and inure to the benefit of each and every company or person to whom the carrier may entrust or deliver the above described property for transportation, and shall define and limit the liability therefor of such other company or person.

14. Also, that the carrier shall not be responsible for stains upon packages nor for loss or damage caused by the shrinking of any wooden or other package whether due to climatic influences or otherwise.

15. Also, that full freight is payable on damaged goods; but no freight is due on any increase in bulk or weight caused by the absorption of water during the voyage.

16. Also, that if on a sale of the goods at destination for freight and charges, the proceeds fail to cover said freight and charges, the carrier shall be entitled to recover the difference from the shipper.

17. The shipowner shall not be liable for any claims whatsoever unless written notice thereof shall be given to the shipowner before the removal of the goods from the wharf, even though such removal be by customs authorities, or within three days after the vessel shall have finished discharging, if the goods shall not have been removed sooner. Suit to recover for loss and/or damage shall not in any event be maintainable against the shipowner unless instituted within six months after the giving of written notice as above provided or after the vessel shall have finished discharging. No agent nor employee shall have authority to waive any of the provisions or requirements of this bill of lading. Any action by the shipowner or its agents or attorneys in considering or dealing with claims where the provisions or requirements of this bill of lading have not been complied with, shall not be considered a waiver of such requirements and they shall not be considered as waived except by an express waiver.

18. Green fruits, vegetables, meats and any other kind of perishable goods will be carried in ordinary cargo compartments or holds, unless it has been expressly agreed, for a special rate of freight, that such goods will be carried in a refrigerated, chilled or specially ventilated compartment. Where such goods of a perishable nature are carried in ordinary compartments and a special rate of freight is not paid, the shipper represents that such goods do not need, and the shipowner will not be required to give them, any other treatment than that given to ordinary non-perishable cargo. The refrigeration, chilling or ventilating machinery shall be considered part of the machinery and appurtenances of the vessel and all the exceptions mentioned elsewhere in this bill of lading shall be applicable thereto and to the cargo carried in the refrigerated compartments.

19. Also, in case any part of the goods cannot be found for delivery during the steamer's stay at the port of destination, they are to be forwarded by first opportunity, when found, at the carrier's expense, the steamer not to be held liable for any claim for delay or otherwise.

20. Also, that merchandise on wharf awaiting shipments or delivery be at shipper's risk of loss or damage by fire and/or flood, and/or robbery.

21. Also, that in case of quarantine the goods may be discharged into any depot, lazaretto, hulk or other place or vessel as may be required for ship's despatch, or should this be impracticable or inadvisable in the opinion of the Master, the goods may be landed at such port as he may deem most convenient, at the risk and expense of the owners of the goods, or they may be retained on board until steamer's return trip. Quarantine expenses upon the goods, of whatever nature or kind, shall be borne by the owners of the goods whether in the ship's hold, in lighter, hulk, craft or on shore.

22. Also, that when it is necessary to verify weights or measurements in dispute, the expenses of re-weighing or re-measuring shall be paid by the party in error. Double freight will be charged on all goods not correctly described.

23. Also, that any carrier or party liable on account of loss or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property.

24. Cargo for Callao may be delivered to the Custom House or Muelle Darsena, under receipt, which receipt will relieve the carrier from all responsibility. The cargo discharged at Callao shall pay additional freight according to the tariff approved by the Steamship Companies, and that tariff shall be taken as forming an integral part of the Bill of Lading. In all cases the steamship company's responsibility shall cease immediately the goods have left steamer's tackles. All discharging and reshipping expenses on cargo destined for minor ports and which has to be cleared and despatched at a major port, are for the account of and payable by consignee, and must be cleared at the Callao Custom House by the Owner or Agent immediately on the steamer's arrival, otherwise the goods to be landed at Callao for account and risk of consignee; and in such case the receipt of the Muelle Darsena or Certificate of the Resguardo or other port authorities that the goods have been landed, to be accepted by the owners or consignees as a thorough and legal cancelment of this bill of lading.

25. It is also mutually agreed that all questions arising under this Bill of Lading shall be construed according to the laws of the United States of America as administered in the United States and nothing herein contained shall prevent the ship owner from claiming in the United States of America the benefits of the United States Revised Statute Sections 4281 to 4287 and the rules from time to time made thereunder and of the provisions of the Act of Congress of the United States approved on the 13th day of February, 1893, entitled "An Act relating to Navigation of Vessels, &c." Provided, that in all cases where merchandise or property is transported under this contract from or between the Ports of the United States and foreign ports within the meaning of the said Act of Congress of 1893, and proceedings are taken against the company or vessel carrying the goods in the United States of America, then the provisions of the said Act of Congress and Revised Statutes shall be held to apply to this contract, and the shipments shall be subject to all the terms and provisions of, and all exemptions from liability contained in the said Act of Congress and Revised Statutes; and any provisions in this Bill of Lading inconsistent with the said Act of Congress and Revised Statutes shall be treated as struck out and expunged.

(CONTINUED OVER PAGE)

Stipulation of

(continued from overpage)

58. The Shipper, Vessel, Consignee, Destination and Goods referred to overpage as mentioned or described on this side (reversed) hereof are as follows:

SHIPPER J.H. SENIOR, AGENT. PER S.S. "TOLUMA" (NORW.)

EXPECTED TO SAIL NOVEMBER 17th, 1926 DESTINATION BAHIA BLANCA, ARGENTINE.

CONSIGNED ORDER OF NESS. INDIA OIL CO.

NOTIFY

DESCRIPTION OF GOODS

Marks	Numbers	Quantities	SHIPPER'S DESCRIPTION OF CLASS AND CONTENTS OF PACKAGES	GROSS LBS.	Gross Kilos
STANDARD		10000	CASES PETROLEUM REFINED OIL.	652500	
		43000	CASES NAPHTHA	3418500	1100000/0
		2000	CASES NAPHTHA	154000	
		55000		4425000	

55000 @ 27¢ Case 14850 00

Storage 4 00

$ 14854 00

Bill of Lading Submitted With Stipulation of Agreed Facts (Continued).

STANDARD	10000	CASES PETROLEUM NAPHTHA Gls. 420000		
	43000	CASES NAPHTHA	3414500	110000/0
	2000	CASES NAPHTHA	154000	
	55000		4425000	
	55000 CS	27 ¢ Case		14850 00
		Stamp Tax		4 00
				$ 14854 00

COMPTROLLER'S CHECKED

$

FREIGHT TO BE PREPAID

AND FINALLY, in accepting this bill of lading, the shipper, owner and consignee of the goods and the holder of the bill of lading agree to be bound by all of its stipulations, exceptions, and conditions, whether written or printed, as fully as if they were all signed by such shipper, owner, consignee or holder, and it is hereby mutually stipulated and agreed that this bill of lading shall have the effect of a special contract.

IN WITNESS WHEREOF, the Master or Agent of the said ship hath affirmed to 3 bills of lading, all of this tenor and date, one of which being accomplished, the others to stand void.

Dated at NEW YORK, this 16 th day of NOVEMBER 193 8

GRACE LINE, Inc.

ACCEPTED Richard W. Muller
For the Shippers.

By.....

[fol. 54] GENERAL AVERAGE BOND SUBMITTED WITH STIPULATION OF AGREED FACTS

(Omitted pursuant to stipulation.)

GENERAL AVERAGE STATEMENT SUBMITTED WITH STIPULATION OF AGREED FACTS

Johnson & Higgins, Average Adjusters,
67 Wall St., N. Y.

Average Agreement

Agreement made as of the twenty-first day of January, 1929, between Akties "Cuzco," owners of the S/S "Toluma," parties of the first part, and the several parties, subscribers hereto, parties of the second part, witnesseth:

Whereas, it is alleged that said vessel, laden with cargo, sailed from New York and Norfolk during November, 1928, for Bahia Blanca-Puerto Madyrn-Magallanes-Corral, and that in the prosecution of her voyage, on November 22nd, 1928, she was in collision with S/S "Sucarseco," as a result of which she sustained damage and put back to Norfolk for survey and repairs, and

Whereas, by reason of occurrences on the voyage, certain losses and expenses were, and other losses and expenses may be, incurred, which may constitute a charge by way of general average, or otherwise, upon said vessel, her earnings, and her cargo, or which may apply to and be due from specific interests:

[fol. 55] Now therefore we, the subscribers, being or representing owners, shippers or consignees of such of the cargo of said vessel as is severally described and set opposite our respective signatures hereto, in consideration of the premises and of the delivery of such cargo as may be saved, do hereby, for ourselves and our principals and executors and administrators, severally and respectively, but not jointly, nor one for the other, covenant and agree to and with the owners of said vessel for themselves and for all interests concerned in the venture aforesaid, and one with the other, that so much of the losses and expenses aforesaid as upon an adjustment of the same to be stated

by Johnson & Higgins, Average Adjusters, according to the provisions of the contract of affreightment and to the laws and usages applicable, may be shown by the statement to be a charge upon said cargo, or to be due from us, shall be paid by us respectively, according to our ratable proportion thereof, to the owners of said vessel, or Johnson & Higgins, in and for settlement in accordance with said statement.

Should the value of the services rendered to said cargo be determined by settlement or arbitration, we do hereby severally covenant and agree to pay each our ratable proportion of any sum thus fixed; and in the event of suit being brought to recover for such services, we do hereby severally covenant and agree to give bond for our respective interests in the same manner as if the salvors had required such bond direct from us before surrendering the cargo, and to pay and satisfy fully our ratable proportion of any final judgment rendered therein.

[fol. 56] We do hereby severally authorize and direct our respective insurers and all other persons and corporations, who or which guarantee the payment of any general average and/or salvage and/or special charges and/or any amounts that may become due from us under this agreement, to pay for and in our behalf unto the owners of said vessel, or Johnson & Higgins, for the purposes aforesaid, the amounts shown by said statement to be due from us respectively.

We do hereby severally promise and agree to furnish promptly, on request of said adjusters, all such information and documents as they may require to prepare said statement, and in the event of inability or failure to do so in respect to any shipment or shipments, said adjusters are authorized to prepare said statement on such information as they can by reasonable diligence obtain, and such statement shall be binding as respects the information so acted upon; but if, thereafter, proper informaton and documents are furnished the adjusters and request is made that such statement be amended, it shall be amended, provided the party making the request pays the expenses of preparing, and collecting under the amendment, but the vessel owners, adjusters and trustees shall be under no responsibility in respect of any payment or distribution to or settlement with any other interest, which may have been previously made under the original statement.

This agreement may be executed in several parts, which shall constitute one agreement, by the parties of the second part, and, upon such execution, and the release of said cargo by the parties of the first part, shall have full force and effect.

[fol. 57] In witness whereof, we have executed these presents in the City of Bahia Blanca as of the day and year first above written.

Signatures: p. p. de Angel Grandes; H. Sanches.

Description, viz.—Marks and Numbers; No. Packages; Goods; B/L No.: New York for Bahia Blanca; A G 1/38; Bahia Blanca; Made in U. S. A.; Stow away from boilers in cool place; Mdse.; 38 CS. storage batteries.

Form approved by the Board of Underwriters of New York.

This Agreement must be signed by a member of the firm or an officer of the Company or some party having "power of attorney" and if signed by an officer or attorney it must be so designated hereon.

GENERAL AVERAGE GUARANTY SUBMITTED WITH STIPULATION OF AGREED FACTS

Int. 4

New York, 11/30/28.

Messrs. Johnson & Higgins, New York:

In consideration of the delivery from the S/S "Toluma" of the following goods, viz: 38 cs. storage batteries, Bahia Blanca, shipped by Bond Electric Corp., formerly Yale Electric Corp., without the requirement of a deposit, we [fol. 58] hereby guarantee the payment of all General Average, Salvage and/or Special Charges for which said goods are liable.

Providence Washington Insurance Co., Wm. H. McGee & Co., Inc., Marine Agents, C. E. Burkton, Sec.

In United States District Court, Southern District of New York

#319

A101-148

Aktieselskabet Cuzo, Owner of the Steamship "Toluma", Libellant,

against

Steamship "Sucarseco", Her Engines, Boilers, etc., and Submarine Boat Corporation, Claimants

Submabine Boat Corporation, as Owner, Transmarine Corporation, as Charterer, of the S. S. "Sucarseco", Cross-Libellants

against

S. S. "Toluma", Her Engines, etc., Aktieselskabet Cuzco, as Owner, and Grace Line, Inc., as Charterer, Cross-Respondents

[fol. 59] West India Oil Company, J. H. Senior, Agent, American Insurance Company et al., Libellants,

against

Henry R. Sutphen and Irving Trust Company, Receivers for Submarine Boat Corporation and Transmarine Corporation, Respondents

(Consolidated Cause)

Kirlin, Campbell, Hickox, Keating & McGrann (W. H. McGrann, of Counsel), for libellant, Aktieselskabet Cuzco, and Steamship "Toluma".

Bigham, Englar, Jones & Houston (D. Roger Englar and Leonard J. Matteson, of Counsel), for libellants West India Oil Company et al.

White & Case and Single & Single (Alonzo L. Tyler, of Counsel), for S. S. "Sucarseco", Submarine Boat Corporation and its receivers.

Opinion

Patterson, D. J.:

There was a collision at sea between the "Toluma" and the "Sucarseco". The collision was due to the fault in

navigation of the two vessels equally. Both were damaged, the "Toluma" so badly that the master determined to run to a port of refuge for repairs. Part of the cargo was unloaded, repairs made and the cargo reloaded, after which the voyage was resumed. The repairs and incident expenses involved a large sum of money and were paid by the owner of the "Toluma".

The bills of lading governing the carriage of the "Toluma's" cargo contained the customary Jason clause, to the [fol. 60] effect that in case of danger or disaster resulting from fault in navigation (the shipowner having exercised due diligence to make the ship seaworthy), the owners of cargo should contribute with the shipowner in general average to the payment of sacrifices, losses or expenses of a general average nature incurred for the common benefit, to the same extent as if the danger or disaster had not arisen out of fault in navigation. Accordingly, on arrival at destination the cargo was subject to a lien for general average expenses and losses. A general average statement was made, apportioning the expenses and losses between the shipowner and cargo owners, and under this statement the sum of $39,394.01 was charged against the cargo owners. Most of these parties have paid in their contributions. The only physical damage to cargo resulting from the collision was breakage due to handling in the course of repairing the ship, the amount of such damage being $2,956.89, which sum was allowed to cargo in the general average.

Three suits were brought in this court and were ordered consolidated for trial. The first is by the owner of the "Toluma" against the "Sucarseco". The damages demanded include the full amount paid for repairs to the vessel, no deduction being made for the sums assessed against and collected from cargo owners in general average. The second is a cross-libel by the owner of the "Sucarseco" against the "Toluma" for damages sustained by the "Sucarseco". The third is by owners of cargo on the "Toluma" against the owner of the "Sucarseco", to recover the amounts paid by them as general average contributions. The facts referrred to above have been stipulated as true.

[fol. 61] The question is whether in a collision case where both vessels were at fault, the cargo owner may recover from the non-carrying vessel not merely the physical damage suffered by cargo but also the amount which he has paid as contribution in general average to the carrying

vessel, liability for such contribution having resulted from the presence of the "Jason Clause" in the contract of affreightment.

It is settled that between two vessels equally at fault in a collision the damages will be divided in equal amounts. The North Star, 106 U. S. 17. It is also clear that for physical damage done to cargo the cargo owner may recover in full from the non-carrying vessel, The Atlas, 93 U. S. 302, and this notwithstanding that as between the cargo owner and the carrier the latter, though at fault in the collision, is not liable because of the Harter Act. One-half of the amount so paid by the non-carrier to the cargo owner will be charged against the carrier in settling the controversy between them, thus indirectly making the carrier liable up to one-half the damage to cargo. The Chattahoochee, 173 U. S. 540. It is therefore clear in this case that those whose goods were damaged to the amount of $2,956.89 through breakage while the "Toluma" was being repaired may recover the full amount directly from the "Sucarseco", and the latter may pass on the "Toluma" one-half of this amount.

Now as to the right of the cargo owner to recover from the non-carrying vessel what he has paid by way of general average. The liability of a cargo owner to contribute in general average toward sacrifices or losses suffered by the shipowner is comparable to the liability of an insurer of [fol. 62] maritime risks. Where the damage to hull is caused solely by the fault of a stranger, the primary liability to make the loss good is on the stranger, and the liability of the cargo owner to the ship owner in general average is no more than secondary. These views were set forth in Pool Shipping Co. v. United States, 33 Fed. 2nd 275, 277, a collision case where the Circuit Court of Appeals of this Circuit held that the owner of the innocent vessel might recover full damages from the owner of the vessel at fault, although part of the damages had already been collected by the former from owners of cargo under general average. The court added that recovery to the extent of any amount already contributed by the cargo owner would be for the latter's account.

Where a collision is brought about by negligent navigation of both vessels, there is no obligation on the cargo owner to contribute in general average to the sacrifices or

losses of the carrier, in the absence of an express agreement to make contribution. The Irrawaddy, 171 U. S. 187; The Jason 225 U. S. 32. With such an agreement, there is a liability on the cargo owner to contribute in general average, but that liability is still secondary. The primary responsibility is upon the other vessel for its proportionate share of the injury. If the cargo owner has made good to the carrier part of the loss incurred, the carrier on later recovery against the other vessel must account to the cargo owner for a proportionate amount when the damages have thus been diminished. See Ralli v. Societa Anonima, 222 Fed. 994.

From these views it must follow that the cargo owner whose goods have not been injured but who has paid contribution in general average toward making good the loss [fol. 63] suffered by his carrier in a collision with another vessel in which both vessels were guilty of negligent navigation has no direct right of action against the other vessel. His only basis of recovery against the other vessel is by subrogation to the right of the carrier.

It is argued that The Energia, 66 Fed. 604, is opposed to this result. There the carrying vessel was solely at fault and it was held that cargo owners who had contributed in general average might recover back what had been exacted from them. The case did not involve any of the questions presented here.

There is another aspect of the case that in my opinion suffices to defeat any direct recovery by the cargo owners against the "Sucarseco" for what they have paid in general average. As already pointed out, the law at large imposed no burden on them to contribute in general average, because the carrier was negligent. That burden fell upon them because of their agreement with the carrier that under the conditions which later developed they would contribute to make good losses of a general average nature even though caused by the carrier's negligence. Their loss arose only because of their contract with the carrier. The fact that the "Sucarseco" injured the "Toluma" does not make it liable to persons who incurred losses because of contracts with the owner of the "Toluma" that were rendered burdensome because of the injury. In the eye of the law such damages are too remote. Robins v. Flint,

275 U. S. 303; The Federal No. 2, 21 Fed. 2nd 313; Insurance Co. v. Brame, 95 U. S. 754.

The result is that the cargo owners are entitled to recover from the "Sucarseco" the physical damage done to [fol. 64] cargo; the "Toluma" is entitled to recover from the "Sucarseco" one-half the amount by which its damages exceeded those of the "Sucarseco," the damages to the former to include items for which it was reimbursed in general average, and the damages to the latter to include the amount which it must pay to the cargo owners; and the cargo owners will be entitled to recover from the "Toluma" their proportionate part of one-half the damages allowed to the "Toluma" of a general average character. In case of disagreement as to the computations the matter will be sent to a commissioner.

(Sgd.) Robert P. Patterson, U. S. D. J.

June 23, 1933.

[fol. 65] In United States District Court

Aktieselskabet Cuzco, Owner of the Steamship "Toluma," Libelant,

against

Steamship "Sucarseco," Her Engines, Boilers, etc., Submarine Boat Corporation, Claimant

(and two other cases)

Present: Honorable Robert P. Patterson, District Judge.

Final Decree—Feb. 23, 1934

This consolidated cause having been submitted to this Court for determination and decree upon all the pleadings and stipulations in the several libels and the cross-libel, and upon a stipulation of agreed facts dated February 23, 1933, and the documents referred to therein, and briefs having been submitted by advocates for the respective parties, and due deliberation having been had thereon, and the Court having rendered its decision in writing and its findings of fact and conclusions of law, dated June 23, 1933, determining the rights of the parties according to the [fol. 66] agreement contained in the stipulation of agreed facts that the collision was due to fault in navigation on the

part of the steamship "Toluma" and the steamship "Sucarseco," equally, holding (1) that the cargo owners, West India Oil Company, et al., are entitled to recover from the "Sucarseco" the physical damages sustained by cargo as a result of the collision; and, (2) that Aktieselskabet Cuzco is entitled to recover from the "Sucarseco" one-half the amount by which its damages exceeded those of the "Sucarseco," the damages of the "Toluma" to include items for which it was reimbursed in part by cargo in general average, and the damages of the "Sucarseco" to include the amount which it must pay hereunder to cargo owners [on account of the physical damages sustained by cargo]; and, (3) holding that the cargo owners are not entitled to recover from the "Sucarseco" their damages consisting of their contributions to general average losses and expenses, but are entitled to recover from the "Toluma" their proportionate share of one-half the damages allowed to the "Toluma" of a general average character; and it appearing from the stipulation of facts that the cargo libelants who suffered physical damage (damage by handling) due to the collision are West India Oil Company in the sum of $2,051.83 and The Texas Company in the sum of $905.08, and that interest on said claims from February 23, 1933, to the date thereof amounts to the sums of $122.43 and $54.01, respectively, and it appearing from the stipulation of facts that the "Toluma's" damages, including those items for which it was reimbursed in general average amount to the total sum of $80,790.83, with interest thereon from Feb- [fol. 67] ruary 23, 1933, to the date of entry of this decree, computed in the sum of $4,820.89, amounting in all to the sum of $85,611.72, and that the said sum includes items for which the "Toluma" was reimbursed in general average, amounting to the sum of $40,322.95, and that the libelant cargo owners' proportionate share of one-half thereof, based on their general average contributions, amounts to $16,924.58, which, with interest thereon from February 23, 1933, to the date hereof, computed in the sum of $1,009.82, amounts to the sum of $17,934.40, and it further appearing from the stipulation of facts that the damages sustained by the Submarine Boat Corporation, as owner of the "Sucarseco," amount to the sum of $14,889.46, with interest thereon from February 23, 1933, to the date hereof, computed in the sum of $888.47, amounting in all to the sum of $15,777.93;

Now, on motion of Kirlin, Campbell, Hickox, Keating & McGrann, it is

Ordered, adjudged and decreed that the libelant, West India Oil Company, recover the sum of $2,051.83, plus interest in the sum of $122.43, making a total sum of $2,174.26, and that The Texas Company recover the sum of $905.08, plus interest in the sum of $54.01, making the total sum of $959.09, being the amount of the physical damage (damage by handling) sustained by their respective interests in cargo on board the steamship "Toluma," of and from the steamship "Sucarseco," her engines, etc., and/or the claimant and/or receivers and/or stipulators; and, it is further

Ordered, adjudged and decreed that the libelant, Aktieselskabet Cuzco, as owner of the steamship "Toluma," do [fol. 68] recover of and from the steamship "Sucarseco," her engines, etc., and/or the claimant and/or stipulators for value, one-half the difference between the damages sustained by the steamship "Toluma," with interest, amounting to the total sum of $85,611.72, and the damages sustained by the steamship "Sucarseco," with interest, including the amount which the latter must pay hereunder to West India Oil Company et al., amounting to the sum of $18,911.38, which said one-half the difference amounts to the sum of $33,350.17, and that of and from said sum the following named cargo libelants do recover of and from the S. S. "Toluma" and the libelant, Aktieselskabet Cuzco, the sum of $17,934.40, the same being cargo owners' proportionate share of one-half the damages allowed to the "Toluma" of a general average character, with interest, and that the same be recovered by and paid to the following named cargo libelants in amounts proportionate to their respective contributions in general average as hereinafter set after their names, as follows:

	Proportion of G/A items allowed to "Toluma"	Interest	Total
West India Oil Company	$1,854.41	$110.65	$1,965.06
Home Insurance Company	109.50	6.51	116.01
Providence Washington Insurance Company	146.77	8.76	155.53
Atlantic Mutual Insurance Co	104.75	6.25	111.00
Norwich Union Fire Insurance Society, Ltd	115.15	6.87	122.02
Federal Insurance Company	109.97	6.56	116.53
Thames & Mersey Marine Insurance Co., Ltd	23.31	1.39	24.70

[fol. 69]

	Proportion of G/A items allowed to "Toluma"	Interest	Total
Eagle Star & British Dominions Insurance Co	1,182.88	70.58	1,253.46
Royal Insurance Company, Ltd	42.43	2.53	44.96
British & Foreign Marine Insurance Co., Ltd	413.88	24.69	438.57
Great American Insurance Co	665.38	39.70	705.08
United States Fire Insurance Company	881.30	52.59	933.89
Universal Insurance Co	809.85	48.32	858.17
Globe & Rutgers Fire Insurance Co	551.66	32.92	584.58
Connecticut Fire Insurance Company	386.87	23.08	409.95
Fireman's Fund Insurance Company	358.25	21.37	379.62
Union Insurance Society of Canton, Ltd	7.13	.42	7.55
Continental Insurance Co	36.69	2.19	38.88
Standard Marine Insurance Company, Ltd	7,678.46	458.18	8,136.64
Sea Insurance Company, Ltd	22.22	1.32	23.54
Fidelity-Phenix Fire Insurance Co	431.74	25.76	457.50
Automobile Insurance Company of Hartford	32.20	1.92	34.12
United States Merchants & Shippers Insurance Co	116.23	6.93	123.16
Insurance Company of North America	227.86	13.60	241.46
Phoenix Insurance Company	46.18	2.75	48.93
Union Marine Insurance Company	55.98	3.34	59.32
American Insurance Co	22.60	1.35	23.95
The Texas Company	430.19	25.67	455.86
L. L. Jacbos	60.74	3.62	64.36
Totals	$16,924.58	$1,009.82	$17,934.40

[fol. 70] and it is further

Ordered that unless this decree be satisfied or an appeal be taken therefrom within ten (10) days after service of a copy hereof on the proctors for the steamship "Sucarseco" Submarine Boat Corporation, West India Oil Company et al., and Henry R. Sutphen and Irving Trust Company, Receivers for Submarine Boat Corporation and Transmarine Corporation, execution may issue against the steamship "Sucarseco," Submarine Boat Corporation, West India Oil Company et al., and Henry R. Sutphen and Irving Trust Company, Receivers for Submarine Boat Corporation and Transmarine Corporation, and their stipulators, to obtain satisfaction of this decree.

Robert P. Patterson, U. S. D. J.

Further notice of settlement waived.

Single, Atkins & Tyler, Counsel for S. S. "Sucarseco."

Bigham, Englar, Jones & Houston, Counsel for West India Oil Company et al.

[fol. 71] In United States District Court, Southern District of New York

Aktieselskabet Cuzco, Owner of the Steamship "Toluma," Libellant,

against

Steamship "Sucarseco," Her Engines, Boilers, etc., Submarine Boat Corporation, Claimant

(and Two Other Cases)

Notice of Appeal and Allowance of Appeal

Sirs:

Please take notice that the libellants, West India Oil Company and J. H. Senior, Agent, American Insurance Company, Atlantic Mutual Insurance Company, Automobile Insurance Company, British & Foreign Marine Insurance Company, Connecticut Fire Insurance Company, Continental Insurance Company, Eagle Star & British Dominions Insurance Company, Federal Insurance Company, Fidelity Phenix Insurance Company, Fireman's Fund Insurance Company, Globe & Rutgers Fire Insurance Company, Great American Insurance Company, Home Insurance Company, Insurance Company of North America, Norwich Union Fire Insurance Company, Phoenix Insurance Company, Providence-Washington Insurance Company, Royal Insurance Company, Sea Insurance Company, Standard Marine Insurance Company, Thames & Mersey Marine Insurance Company, Union Insurance Society of Canton, Ltd., Union Marine Insurance Company, Universal [fol. 72] Insurance Company, United States Fire Insurance Company, United States Merchants & Shippers Insurance Company, The Texas Company and L. L. Jacobs, hereby appeal to the United States Circuit Court of Appeals for the Second Circuit from the final decree entered in the above entitled consolidated cause on the 23rd day of February, 1934, in so far as the same fails to allow to said libellants recovery of the full amount of their damages as claimed, of and from the steamship "Sucarseco," and Henry R. Sutphen and Irving Trust Company, Receivers for Submarine Boat Corporation and Transmarine Cor-

poration, and in so far as the same allows libellant Aktieselskabet Cuzco to recover as damages sums for which it was reimbursed by cargo contributions in general average and which the above named cargo libellants claim as damages recoverable from the steamship "Sucarseco" and Henry R. Sutphen and Irving Trust Company, Receivers for Submarine Boat Corporation and Transmarine Corporation.

Dated New York, February 26, 1934.

Yours, etc., Bigham, Englar, Jones & Houston, Proctors for Appellants, West India Oil Company, et al.

To:

Charles Weiser, Esq., Clerk, U. S. District Court for the Southern District of New York.

[fol. 73] Messrs. Single, Atkins & Tyler, Proctors for S. S. "Sucarseco" and Henry R. Sutphen and Irving Trust Company, Receivers for Submarine Boat Corporation and Transmarine Corporation, 116 John Street, New York, N. Y.

Messrs. Kirlin, Campbell, Hickox, Keating & McGrann, Proctors for Aktieselskabet Cuzco, 27 William Street, New York, N. Y.

London & Lancaster Indemnity Company of America.

The foregoing appeal is hereby allowed.

Dated New York, February 26, 1934.

Jno. C. Knox, U. S. D. J.

[fol. 74] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

AKTIESELSKABET CUZCO, Owner of the Steamship "TOLUMA," Libellant,

against

Steamship "SUCARSECO," Her Engines, Boilers, etc., SUBMARINE BOAT CORPORATION, Claimant

(and Two Other Cases)

ASSIGNMENT OF ERRORS

The libellants, West India Oil Company and J. H. Senior, Agent, American Insurance Company, Atlantic Mutual Insurance Company, Automobile Insurance Company, British

& Foreign Marine Insurance Company, Connecticut Fire Insurance Company, Continental Insurance Company, Eagle Star & British Dominions Insurance Company, Federal Insurance Company, Fidelity Phenix Insurance Company, Fireman's Fund Insurance Company, Globe & Rutgers Fire Insurance Company, Great American Insurance Company, Home Insurance Company, Insurance Company of North America, Norwich Union Fire Insurance Company, Phoenix Insurance Company, Providence-Washington Insurance Company, Royal Insurance Company, Sea Insurance Company, Standard Marine Insurance Company, Thames & Mersey Marine Insurance Company, Union Insurance Society of Canton, Ltd., Union Marine Insurance Company, Universal Insurance Company, United [fol. 75] States Fire Insurance Company, United States Merchants & Shippers Insurance Company, The Texas Company and L. L. Jacobs, hereby assign error in the opinion, findings and decree of the District Court, as follows:

1. In that the court failed to award to the libellants recovery of their damages in full as claimed, of and from the steamship "Sucarseco" and Henry R. Sutphen and Irving Trust Company, Receivers for Submarine Boat Corporation and Transmarine Corporation, respondents, and allowed libellant Aktieselskabet Cuzco to recover, as damages, sums for which it was reimbursed by cargo contributions in general average which were claimed by the above-named libellants as cargo damages recoverable directly from the steamship "Sucarseco" and Henry R. Sutphen and Irving Trust Company, Receivers for Submarine Boat Corporation and Transmarine Corporation.

2. In that the Court declined to hold that contributions by cargo interests in general average to losses and expenses incurred by the master for the purpose of minimizing damages, constitute cargo damage resulting from the collision recoverable from the colliding vessel in the same manner as physical damage.

3. In that the Court held that the liability of cargo for contribution in general average resulted from the presence of the Jason Clause in the contract of affreightment.

4. In that the Court held that the liability of a cargo owner to contribute in general average towards sacrifices

[fol. 76] or losses suffered by a shipowner is comparable to the liability of an insurer of maritime risks.

5. In that the District Court proceeded on the assumption that contributions by cargo in general average are contributions towards sacrifices or losses suffered by the shipowner, including damage to hull.

6. In that the Court held that where the damage to hull is caused solely by the fault of a stranger, the primary liability to make the loss good is on the stranger and the liability of a cargo owner to the shipowner in general average is no more than secondary.

7. In that the Court held that where a collision is brought about through negligent navigation of both vessels there is no obligation on the cargo owner to contribute in general average to sacrifices or losses of the carrier in the absence of an express agreement to make contribution.

8. In that the Court held that when a Jason Clause is included in the bill of lading there is a liability on the cargo owner to contribute in general average, but that that liability is still secondary and that the primary responsibility is upon the other vessel for its proportionate share of the injury.

9. In that the Court held that the cargo owner whose goods have not been injured but who has paid contribution in general average toward making good the loss suffered [fol. 77] by his carrier in a collision with another vessel, in which both vessels were guilty of negligent navigation, has no direct right of action against the other vessel and that his only basis of recovery against the other vessel is by subrogation to the right of the carrier.

10. In that the Court held that the loss of the cargo owners resulting from contributions in general average arose only because of their contract with the carrier.

11. In that the court held that the fact that the "Sucarseco" injured the "Toluma" does not make her liable to persons who incurred losses because of contracts with the owner of the "Toluma" that were rendered burdensome because of the injury, and that for this reason cargo owners may not be permitted to recover the amount of such

losses from the "Sucarseco" and owners because such damages are too remote.

12. In that although the court held that the cargo owners on payment of general average contributions are subrogated to the rights of the carrier, it failed to allow the cargo owners to recover directly from the steamship "Sucarseco" and Henry R. Sutphen and Irving Trust Company, Receivers for Submarine Boat Corporation and Transmarine Corporation to the extent of their subrogated rights.

Dated New York, February 26, 1934.

Bigham, Englar, Jones & Houston, Proctors for West India Oil Company, et al., Libellants.

[fol. 78] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

A101-148

[Title omitted]

(And Two Other Cases)

(Consolidated Cause)

STIPULATION AS TO CONTENTS OF RECORD

It is hereby stipulated and agreed by and between the proctors for the respective parties herein that the general average statement of Johnson & Higgins, average adjusters, dated New York, September 24, 1929, submitted with the stipulation of agreed facts need not be printed in the transcript of record but may be handed up on the argument of this appeal with the same force and effect as though incorporated herein.

Dated New York, N. Y., March 17th, 1934.

Bigham, Englar, Jones & Houston, Proctors for Appellants, West India Oil Company et al.

Single, Atkins & Tyler, Proctors for S. S. "Sucarseco" and Receivers for Submarine Boat Corporation et al.

Kirlin, Campbell, Hickox, Keating & McGrann, Proctors for Aktieselskabet Cuzco.

[fol. 79] In United States District Court, Southern District of New York

A101-148

[Title omitted]

(And Two Other Cases)

(Consolidated Cause)

Stipulation as to Record

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court in the above entitled matter as agreed upon by the parties.

Dated New York, March 17th, 1934.

Bigham, Englar, Jones & Houston, Proctors for Appellants, West India Oil Company et al.

Single, Atkins & Tyler, Proctors for S. S. "Sucarseco" and Receivers for Submarine Boat Corporation et al.

Kirlin, Campbell, Hickox, Keating & McGrann, Proctors for Aktieselskabet Cuzco.

[fol. 80] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 81] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1933

No. 431

Argued May 8, 1934. Decided Aug. 7, 1934

AKTIESELSKABET CUZCO, as Owner of the Norwegian Steamship The Toluma, Libelant,

v.

The Steamship SUCARSECO, Her Engines, Boilers, etc., SUBMARINE BOAT CORPORATION, Claimant (and two other cases),

(Consolidated Cause)

WEST INDIA OIL COMPANY and J. H. SENIOR, Agent, American Insurance Company, et al., Appellants

Appeal from the District Court of the United States for the Southern District of New York

Before Manton, Swan, and Chase, Circuit Judges

Appeal from a decree in admiralty of the District Court for the Southern District of New York. Modified.

Kirlin, Campbell, Hickox, Keating & McGrann, of New York City (W. H. McGrann, of New York City, of counsel), for libelant-appellee Aktieselskabet and The Toluma.

Bigham, Englar, Jones & Houston, of New York City (D. Roger Englar and Leonard J. Matteson, both of New York City, of counsel), for libelants-appellants West India Oil Co. and J. H. Senior, Agent, American Insurance Co., and others.

CHASE, Circuit Judge:

During the night of November 22, 1926, the Norwegian steamship Toluma, bound from New York with a general cargo for South American ports, was in collision at sea off the Chesapeake Capes with the American steamship Sucarseco, also bound from New York with a general cargo but for Pacific Coast ports via the Panama Canal. Both ships were damaged. The Sucarseco proceeded on her voy-

age, but the Toluma was so injured that her master, prudently to save further loss to ship and cargo, put into Norfolk, Va., for repairs. There the cargo of the Toluma had to be in part discharged to permit the necessary repairs to the ship to be made. After such repairs were made, the discharged portion of the cargo was reloaded and the Toluma then completed her voyage and delivered her cargo.

Three suits in admiralty were brought in the Southern district of New York as a result of the collision and its attendant consequences. A libel was filed by Aktieselskabet Cuzco, owner of the Toluma, against the Sucarseco to recover the damages sustained by that ship. A cross-libel was filed by Submarine Boat Corporation, as owner, and Transmarine Corporation, as charterer in possession of the Sucarseco, against the Toluma, Aktieselskabet Cuzco, her owner, and Grace Line, Inc., her charterer, to recover for the damage to the Sucarseco. And a libel was filed by West India Oil Company et al., as the owners, shippers, and [fol. 82] underwriters of cargo on the Toluma, against the receivers of the owner and of the charterer of the Sucarseco to recover their damages, including contributions by cargo in general average.

These suits were all ordered consolidated and were heard together in the District Court on a "Stipulation of Agreed Facts." From the decree entered, the cargo interests, alone have appealed, and the sole question presented is whether there was error in not allowing cargo on the Toluma to recover from the Sucarseco contributions made by cargo in general average.

It is agreed by all parties that both ships were seaworthy and that the collision was caused by faulty navigation for which both were equally at fault. No question involving the correctness of the general average adjustment is before us.

The bills of lading, under which all the Toluma's cargo now interested was carried, contained the so-called Jason clause, and the cargo has made the contributions, required under that clause, in accordance with the general average statement.

Cargo was permitted to recover below only for physical damage sustained. This limited recovery to the damage caused by extra handling, as there was no actual harm done the cargo at the time of collision. Recovery of the general

average contributions was denied on the ground that the rights of an owner of cargo against a ship at fault for a collision with the carrying vessel are derivative only, and on the additional ground that an obligation to contribute in general average under the Jason clause rests wholly on a special contract to which the noncarrying vessel is not a party, and that such damage is too remote to be recoverable.

The precise issue before us on this appeal seems not to have been squarely raised before, though we are given to understand that it has often been mooted and avoided by compromise. However, the principles which must govern the decision are well established. This court decided, before the Harter Act (46 U. S. C. A. §§ 190-195) was passed, that a cargo owner might recover from the carrying ship which was solely at fault for a collision contributions made in general average, and this on the ground that they were a part of the cargo damage. The Energia (C. C. A.) 66 F. 604. The effect of that decision, which is of present importance, is that, in a suit by cargo for collision damages, no distinction purely as an element of damage is to be made broadly between physical cargo damage and damages sustained by cargo by reason of general average contributions. The two stand, generally speaking, on the same footing. This was recognized in Ralli et al. v. Societa Anonima di Navigazione, etc. (D. C.) 222 F. 994; Erie & Western Transp. Co. v. City of Chicago (C. C. A.) 178 F. 42, and Gray's Harbor Tugboat Co. v. Petersen (C. C. A.) 250 F. 956. The same rule obtains in England. The Minnetonka (1905) Prob. Div. 206.

Furthermore, cargo is not at fault for a collision in which the carrying ship is involved with another, and may recover its provable damage from the noncarrying vessel when the fault of that ship is a contributing cause. The New York, 175 U. S. 187, 20 S. Ct. 67, 44 L. Ed. 126; The Atlas, 93 U. S. 302, 23 L. Ed. 863.

When both ships in collision are at fault and cargo has recovered from the noncarrying vessel, the owners of that ship may recover from the carrying vessel one-half of the cargo damages on a division of the total damage for the purpose of determining ultimate recovery as between the two ships. And when the balance between the ships has been struck, there is a single recovery from the other ship

by the ship which has proved the greater loss. The North Star, 106 U. S. 17, 1 S. Ct. 41, 27 L. Ed. 91. Nor is this method of computing the damages and obtaining the balance for a single recovery done away with by the provisions of the Harter Act. The Chattahooche, 173 U. S. 540, 19 S. Ct. 491, 43 L. Ed. 801.

Were it possible to apply these principles without taking other factors into account, the right of recovery of the general average contributions here made would be plain. Because of the comparatively small amount of damage sustained by the Sucarseco, that ship and those interested in her have no financial interest in the outcome of this appeal anyway, and, as it happens, the Toluma is making the real defense of the Sucarseco in the action by Toluma's cargo, for Toluma will be adversely affected by a recovery by her cargo from Sucarseco which will increase the Sucarseco's claim in the division of collision damages between the two ships.

It is claimed that these general average contributions cannot be recovered in full from Sucarseco because the right to recover in any event is derivative and at best limited to the proper proportion of the Toluma's recovery from Sucarseco. This contention is based on theories of the nature of [fol. 83] general average and the import of certain decisions which we believe untenable.

Since it is agreed that all of the contributions were of a general average nature in settlement of expenses properly includable in the average adjustment, we need not now pay further attention to that phase of the matter. In making the expenditures, the master of the Toluma acted as the agent of all concerned in the venture. Ralli v. Troop, 157 U. S. 386, 15 S. Ct. 657, 39 L. Ed. 742. As the representative of the shipowner, the master was under no duty to sacrifice any of the shipowner's property to save cargo. The Jason, 225 U. S. 32, 32 S. Ct. 560, 56 L. Ed. —9. Sacrifices made after the safety of the venture has been imperiled and made to save as much as possible from the threatened danger of loss and to save that for the benefit of all is the basis of a general average of the sacrifice among all concerned. That makes the expenses which the master incurs as the agent of the cargo a primary charge on all the cargo interests whose property is rescued from the danger, and it is payable when the property rescued is

taken to its destination. The master alone can bind the cargo to the payment of such expenses, and when he does that he acts as the agent of cargo. So such expenses, when occasioned by the fault of a stranger, are incurred by cargo not as present commitments in fulfillment of a liability secondary to the stranger's to share the loss sustained by the ship, but as sacrifices made to make it possible to complete the voyage and avert greater loss. Consequently, there can be no distinction in respect to general average contributions by cargo being recoverable as damages by cargo in its own right between a situation where a collision between ships is due to the sole fault of the carrying ship and one where both ships are at fault and the decision in The Energia, supra, which puts such damage on the same plane with physical damage is applicable in principle to this case. While before the Harter Act errors in navigation on the part of the carrying ship gave rise to an action by cargo against that ship to recover its damage including general average contributions, the statute, since the Toluma fulfilled the prescribed conditions for the excuse, excused that ship from liability to cargo though it left the liability of the noncarrier untouched. The idea that the liability of the noncarrying ship, when at fault for a collision, to cargo on the carrying ship, is secondary, may be due in part at least to some reference to the position of cargo as that of a surety or insurer in Pool Shipping Company v. United States (C. C. A.) 33 F. (2d) 275, where the right of the carrying ship to recover as bailee of the cargo was sustained, but that language is not to be torn from its context and given general application. Nor is there anything contrary to our conclusion here in Ralli v. Societa Anonima, etc., supra, where the carrying vessel jointly at fault for the collision had been credited with one-half of the general average contributions in the division of damages between the ships and was required to account to its cargo for this credit.

But even so it is said that the Sucarseco is not lawfully to be required to pay losses sustained by cargo on the Toluma through contributions in general average because the expenses incurred by the master were made binding upon cargo, and so the proper subject of general average contribution, not by virtue of any requirement of law, but because of a private contract between cargo and carrier to

which the Sucarseco was not a party, viz. the Jason clause in the bills of lading. This clause was upheld in The Jason, supra, and has come to be widely used and widely known under that name. It affords a means by agreement for parties in the venture to give to the master authority to act as agent for cargo for the purpose of incurring general average expenses which he would not have under the Harter Act as shown by The Irrawaddy, 171 U. S. 187, 18 S. Ct. 831, 43 L. Ed. 130. This Jason clause is not in any real sense a diminution of the rights cargo would otherwise have. On the contrary, it enables cargo to have the master as its agent at the time and place of the peril to act for it to make such sacrifices as may be timely and effective to avoid greater loss. And to secure that right, cargo agrees to contribute in general average though the Harter Act would otherwise excuse it from so doing. The Irrawaddy, supra.

It is said that losses sustained under such an agreement are too remote to be recovered from the noncarrying ship under the principles in this respect recognized in Robins Dry Dock & Repair Co. v. Flint, 275 U. S. 303, 48 S. Ct. 134, 72 L. Ed. 290; Mobile Life Insurance Company v. Brame, 95 U. S. 754, 24 L. Ed. 580; The Federal No. 2 (C. C. A.) 21 F. (2d) 313, and causes of like import. It may be accepted generally that a tort to one person does not extend in legal consequence to a third person who has [fol. 84] been harmed merely because he had contracted with the one directly injured in person or property by the tort. But the tort of the Sucarseco was not merely of that nature as it affected the Toluma's cargo. It was a direct contributing cause of the loss which was sustained by cargo. It made the expenses necessary. Since the Jason clause is valid, it was lawful for the owners of cargo to ship it at their own risk so far as that clause made the risk theirs. And their liability to contribute in general average under this clause is in no true sense the less a general liability imposed by maritime law than it was when a general average situation was created as a matter of law merely by circumstances occurring on a voyage. Always an essential element has been a common venture of ship and cargo on a voyage. Always the relationship of a ship to cargo and of cargo to ship has been based upon some contract of carriage express or implied. When-

ever such a contract is lawful and is such that cargo is bound to contribute in general average if a general average situation is created, it is the creation of the emergency which makes sacrifices necessary that causes the loss to cargo as much when the Jason clause in a bill of lading underlies general average liability as when a contract of carriage played its part in establishing the required relationship in a common venture at sea to support general average contributions without any Jason clause. The position which would be established for the Sucarseco is no more than to say that, since a cargo owner and the carrying ship need not make a Jason clause agreement, if they choose to do so, a tort-feasor may create a situation which does necessarily cause the cargo owner to make contributions in general average and then escape all liability on that score by saying to the cargo owner in effect: "My tort would not have injured you if you had shipped your goods without obtaining any benefits or assuming any obligations under the Jason clause." We cannot subscribe to the theory that the terms of the contract of carriage are of any concern to the tort-feasor, provided the legal relationship of cargo and carrier coupled with the occurrence of events for which the tort-feasor is legally responsible creates a general average situation that requires cargo to contribute. It may then recover such contributions from the tort-feasor as in The Energia, supra.

The further contention that, if Toluma's cargo recovers from Sucarseco, the resulting increase in the damages which that ship may offset against the claims of the Toluma in the division between them will in effect nullify Toluma's benefit from cargo's contributions to the general average expenses, cannot be considered sound. Of such a nature was the argument rejected in The Chattahooche, 17-U. S. 540, 19 S. Ct. 491, 43 L. Ed. 801.

Decree modified.

[fol. 85] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a stated term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the court-rooms in the Post Office building in the City of New York,

on the 14th day of August, one thousand nine hundred and thirty-four.

Present: Hon. Martin T. Manton, Hon. Thomas W. Swan, Hon. Harrie B. Chase, Circuit Judges.

AKTIESELSKABET CUZCO, Libellant,

vs.

SS. SUCARESCO, SUBMARINE BOAT CORPORATION, Claimant; West India Oil Company et al., Appellants

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is modified in accordance with the opinion of this court with costs to the appellants.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 86] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Aktieselskabet Cuzco vs. SS. Sucaresco. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Aug. 14, 1934. William Parkin, Clerk.

[fol. 87] UNITED STATES OF AMERICA,
Southern District of New York:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 86, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Aktieselskabet Cuzco, Libellant, against SS. Sucaresco, Submarine Boat Corporation, Claimant; West India Oil Company, et al., Appellants, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 1st day of November, in the year of our Lord one thousand nine hundred and thirty-four, and of the Independence of the said United States the one hundred and fifty-ninth.

Wm. Parkin, Clerk. (Seal United States Circuit Court of Appeals, Second Circuit.)

(5614-C)

[fol. 88] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 3, 1934

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 39,152. U. S. Circuit Court of Appeals, Second Circuit. Term No. 524. Aktieselskabet "Cuzco," as Owner of the Norwegian Steamship "Toluma," Petitioner, vs. Steamship "Sucarseco," her engines, boilers, etc., Submarine Boat Corporation, et al. Petition for a writ of certiorari and exhibit thereto. Filed November 10, 1934. File No. 524, O. T., 1934.

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NOV 10
CHARLES ELMORE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 524

AKTIESELSKABET "CUZCO", as owner of the Norwegian Steamship *TOLUMA*,

Petitioner,

against

Steamship *SUCARSECO*, her engines, boilers, etc., SUBMARINE BOAT CORPORATION,

Respondent,

(and two other cases)

WEST INDIA OIL COMPANY and J. H. SENIOR, Agent, AMERICAN INSURANCE COMPANY, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI AND BRIEF.

WILLIAM H. MCGRANN,
Counsel for Petitioner.

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Supreme Court of the United States

No. ..... —October Term, 1934.

Aktieselskabet "Cuzco", as owner of the Norwegian Steamship "*Toluma*",
Petitioner,

vs.

Steamship "*Sucarseco*", her engines, boilers, etc., Submarine Boat Corporation,
Respondent,

(and two other cases)

West India Oil Company and J. H. Senior, Agent, American Insurance Company, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Jurisdiction.

The decree below was entered August 14, 1934. R. 88.

Jurisdiction of the Court is provided by §347(a) of Title 28 of the United States Code.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, Aktieselskabet Cuzco, owner of the Norwegian Steamship *Toluma*, prays that a Writ of Cer-

tiorari issue herein to review a decree of the Circuit Court of Appeals for the Second Circuit, entered on August 14, 1934, R. 88, modifying a final decree of the United States District Court for the Southern District of New York entered on February 23, 1934, R. 65-70, adjusting damages among two colliding vessels and owners of cargo on one of the vessels, arising from a collision between the Norwegian Steamship *Toluma*, and the American Steamship *Sucarseco*, which occurred at sea, off the Atlantic Coast, on the night of November 22, 1928; and, the petitioner respectfully shows unto this Court the following:

I. Statement of Matter Involved.

(a) *The Facts.*

It is agreed that the collision was caused by fault or errors in navigation of both vessels, and that the resulting damages were not caused or contributed to by unseaworthiness of the said vessels, nor by lack of due diligence on the part of the respective owners to make the vessels seaworthy in all respects, R. 47. It is not sought to review here any questions of negligent navigation or seaworthiness, therefore.

The steamship *Toluma*, which was operating as a common carrier, and which was laden with a general cargo, put back into the harbor of Norfolk, Va., to make repairs of the collision damages, and in order to effect the repairs, part of the cargo was discharged, and stored; and, after repairs, the cargo was reloaded, and the *Toluma* resumed and completed her voyage and delivery of her cargo to destinations. R. 50, 59.

There was not any direct physical damage to cargo resulting from the collision; and all expenses incurred at

the repair port, Norfolk, including discharge, storage, and reloading cargo, were paid by the petitioner. R. 48, 50.

The contracts of carriage (bills of lading) contained a condition whereby owners of cargo on the *Toluma* undertook to contribute with the shipowners (petitioner) in general average "to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred for the common benefit" as if the damage had not resulted from negligence of the carrier (*Toluma*). R. 52.

That condition of the contract of carriage, known as "the Jason Clause", reads as follows:

> "In case of danger, damage or disaster resulting from accident or from faults or errors in navigation or in the management of or from any latent or other defect of the vessel, her machinery or appurtenances, from unseaworthiness, even though existing at the time of shipment or at the beginning of the voyage, if the defect or unseaworthiness was not discoverable by the exercise of due diligence and if the shipowner shall have exercised due diligence to make the vessel seaworthy and properly manned, equipped and supplied with respect to the matters concerned in the aforesaid danger, damage or disaster, then the shippers, consignees or owners of the cargo or the holders of this bill of lading shall nevertheless pay salvage and any special charges incurred in respect of the cargo and shall contribute with the shipowners in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred for the common benefit or to relieve the adventure of any common peril, all with the same force and effect and to the same extent as if such accident, danger, damage or disaster had not resulted from or been occasioned by faults or errors in navigation or in the management of the vessel or by any latent or other defect or unseaworthiness." R. 52.

In fulfillment of the terms of that (special) contract, a general average statement was prepared, and cargo owners thereafter paid to the petitioner the ratable proportions shown by the adjustment, for expenses incurred by the petitioner at the repair port (principally the discharge of the cargo to make repairs).

(b) *The Suits.*

Both vessels having sustained damage, each sued the other, and the petitioner included among its items of damage the amounts paid by it on account of its port expenses, including the cost of discharging, storing, and reloading the cargo.

Cargo owners also sued the steamship *Sucarseco* and owners to recover the amounts [in full] which they (cargo owners) had contributed to the petitioner under the terms of the special contract between the petitioner, as owner of the *Toluma*, and the cargo owners (shippers), *i. e.*, "the Jason Clause," *supra*.

(c) *Decisions Below.*

1. The District Court allowed recovery by the petitioner [*Toluma*] from the *Sucarseco* of one-half of its damages, including the repair port expenses; and disallowed direct recovery by cargo owners from *Sucarseco* of the contributions which cargo owners made to the petitioner by reason of the terms of the contract of carriage, but awarded to cargo owners [recovery back] their proportionate part of one-half of the damages "of a general average nature" contributed by cargo owners, and which the petitioner recovered from *Sucarseco*. R. 59-64. Opinion reported in 4 F. Supp. 344.

2. The Circuit Court of Appeals for the Second Circuit modified (reversed) the District Court's decision, and awarded cargo owners recovery in full, direct from *Sucarseco,* of contributions [in full] which cargo owners made to the petitioner [*Toluma*] under the special contract, the Jason Clause; and thereby disallowed the petitioner recovery of expenses which it had incurred at the repair port, and thus reduced petitioner's recovery of its collision damages by one-half of the port expenses. R. 81. Opinion reported in 1934 A. M. C. 1083.

(d) *Opinions Below.*

1. The District Court (by Judge Robert P. Patterson) held, that there is not any obligation on cargo owners to contribute in general average to the losses (expenses) of the carrier, when the losses result from the carrier's negligence, under the decision of this Court in the case of *The Irrawaddy,* 171 U. S. 187; that, whereas the obligation may arise by operation of an express agreement between the carrier and cargo owner to share such expenses ("make contribution"), under the decision of this Court in the case of *The Jason,* 225 U. S. 32, that is a secondary liability only and does not entitle the cargo owner to a direct right of action against the other vessel, *Sucarseco* (non-carrier); but that the cargo owner may have an accounting from the carrier for a proportionate part of the carrier's recovery from the other vessel, *Sucarseco,* under the decision of the same Court in the case of *Ralli* v. *Societa Anonima,* 222 Fed. 994.

Moreover, the District Court found that cargo's contributions were voluntarily made, that is, because of the agreement with the carrier, *Toluma, i. e.,* the Jason Clause, and were too remote, as to *Sucarseco,* to be recoverable from

Sucarseco, under the decisions of this Court in the cases of *Robins* vs. *Flint,* 275 U. S. 303, and *Insurance Co.* v. *Brame,* 95 U. S. 754.

2. The Circuit Court of Appeals of the Second Circuit (by Judges MANTON, SWAN and CHASE) held in effect, that the expenses at the repair port were incurred by the master of the *Toluma* as agent for all concerned [*i. e.,* for cargo, as to its proportion], under the decision of this Court in the case of *Ralli* vs. *Troop,* 157 U. S. 386; that the ship owner [*Toluma*] was not obligated to make any sacrifices [incur expenses?] "to save cargo," under the decision of *The Jason,* 225 U. S. 32; that the expenses incurred [*i. e.,* cargo's proportion] were "sacrifices" made by cargo owners "to make it possible to complete the voyage and avert greater loss"; R. 84-5; that the condition of the contract of carriage, *i. e.,* the Jason Clause, is not a "diminution of the rights cargo would otherwise have," and by agreeing to contribute in general average in accordance with the provisions of the Jason Clause, cargo "secured" the right to have the shipmaster act as its agent "to make such sacrifices as may be timely and effective to avoid greater loss"; R. 86; that "the creation of the emergency" [collision] causes loss to cargo, with or without the Jason Clause, R. 87; and that the terms of the contract of carriage do not concern the tort feasor (*Sucarseco*); and that cargo may recover (in full) from the tort feasor *Sucarseco* (stranger to the contract) despite the principles laid down in the decisions of this Court in the cases of *Robins* v. *Flint,* 275 U. S. 303, and *Insurance Company* vs. *Brame,* 95 U. S. 754, "provided the legal relationship of cargo and carrier coupled with the occurrence of events for which the tort feasor is legally responsible creates a general average situ-

ation *that requires cargo to contribute*", (italics ours). R. 87.

(e) *Effect of decision.*

Whereas, under the ruling of the District Court, the petitioner would have recovered as collision damage one-half of all its port expenses from the joint tort feasor *Sucarseco*, and would then account to cargo (refund) the latter's proportionate part of the recovery; yet, under the ruling of the Circuit Court of Appeals the petitioner cannot recover that part of the port expenses which cargo owners agreed [voluntarily] to contribute, and which petitioner paid; and, cargo owners are awarded their contributions in full (direct from *Sucarseco*), which in turn offsets the full amount against the petitioner's recovery, with the net result that petitioner loses one-half of the port expenses which cargo agreed to contribute, amounting to nearly twenty thousand dollars here. R. 65-70.

In other words, although cargo owners were not obligated to pay anything to the petitioner by way of general average contributions, because of negligence of the petitioner's servants, but for the special contract between cargo owners and petitioner, cargo owners are now allowed to recover from the tort feasor, *Sucarseco*, as a direct collision damage, the full amount of their contributions voluntarily made to the petitioner.

The contract of carriage (*i. e.*, Jason Clause) is thus nullified.

II. Reasons for Allowance of Writ.

The petitioner seeks a review of the decision on the following grounds:

1. The matters involved are of great importance to commercial maritime interests, involving the relationships

of general carriers of cargo, shippers and owners of cargo, and marine insurance underwriters, both domestic and foreign. It may be said that relationships of these interests in every voyage of every general carrier of cargo to and from the United States are materially affected by this decision.

2. The subject of the law of General Average has heretofore received consideration by this Court in such outstanding cases as *Ralli* v. *Troop*, 157 U. S. 386 [decided April 1, 1895], *The Irrawaddy*, 171 U. S. 187 [decided May 31, 1898], and *The Jason*, 225 U. S. 32 [decided May 13, 1912]. While these decisions have settled the American law on the questions raised therein, there have arisen, in subsequent maritime commercial activities, controversial questions growing out of the practical application of the principles of law announced therein, particularly under the last cited case, which should receive the further consideration of this Court, as would be required in a review of the present decision.

3. This Court has not decided questions in the law of General Average raised herein, and because of the previous rulings of this Court in the cases cited under 2 above, and the progression and expansion of the principles therein promulgated to the present situation, it becomes necessary that this Court pass upon the decision herein, in order to settle disputable practices which have arisen.

4. The decision here seems so manifestly untenable, under all principles of law heretofore announced and applied by this Court, that it calls for the exercise of this Court's review.

5. The decision is in direct conflict with the controlling principle of the law of General Average as laid down in the

case of *The Irrawaddy*, 171 U. S. 187. If the master was acting solely as the agent of the cargo, insofar as cargo's interests were concerned, as found by the Circuit Court of Appeals here, the shipowner in the case cited would have been entitled to recover a general average contribution, whereas this Court held he was not so entitled.

6. The decision is in direct conflict with the controlling principle of the law of torts, as to recoverable damage, laid down in the case of *Robins* vs. *Flint*, 275 U. S. 303.

7. The decision is in direct conflict with the weight of authority on the subject involved.

III. The Sole Question Presented.

Whether a cargo owner, suffering no physical damage, and not liable as a matter of general maritime law for a general average contribution because the carrying vessel involved in a collision was negligent [*The Irrawaddy, supra*], may nevertheless sue and recover from the non-carrying vessel, although jointly negligent, a general average contribution paid to his own vessel solely because of a special contract between him and his own vessel, to make such a contribution, to which contract the non-carrying vessel was not a party.

It will be seen that the question here involved will arise in every mutual fault collision case where either of the vessels has cargo on board and is compelled to put into a port of refuge (a very frequent occurrence). It is obvious that, outside the Second Circuit, the maritime community will not be content to accept the decision herein as final, particularly in view of the intrinsic inconsistencies of the opinion. Until the Supreme Court decides the issue we

shall have and continue to have dispute and discord in the settlement of all such collision cases.

A certified copy of the transcript of record of all proceedings in the District Court and the Circuit Court of Appeals is presented herewith.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Second Circuit, demanding the said Court to certify and send to the Supreme Court for its review and determination on a day certain to be therein designated, a full and complete transcript of the record and all proceedings in the said Circuit Court of Appeals, in the said case entitled "Aktieselskabet 'Cuzco', as owner of the Norwegian Steamship *Toluma*, Petitioner, against Steamship *Sucarseco*, her engines, boilers, etc., Submarine Boat Corporation, Respondent, West India Oil Company and J. H. Senior, Agent, American Insurance Company, *et al.*, Respondents"; and that the said decree of the Circuit Court of Appeals in the said case may be modified by this Honorable Court, and that your petitioner may have such other and further relief or remedy in the premises as to this Honorable Court may seem meet and just, and your petitioner will ever pray, etc.

AKTIESELSKABET "CUZCO,"

By WILLIAM H. MCGRANN,
Counsel for Petitioner.

November 9, 1934.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

WILLIAM H. MCGRANN, being duly sworn, says:

That he is counsel for the petitioner herein and that the foregoing petition is true to the best of his knowledge, information and belief.

WILLIAM H. MCGRANN.

Sworn to before me this }
9th day of November, 1934. }

JAMES A. CARNEY

(SEAL)

I hereby certify that I have examined the foregoing petition, that in my opinion it is well founded and entitled to the favorable consideration of the Court and that it is not filed for the purpose of delay.

WILLIAM H. MCGRANN.

Supreme Court of the United States

OCTOBER TERM, 1934. No.....

AKTIESELSKABET "CUZCO", as owner of the Norwegian Steamship "*Toluma*",
Petitioner,

vs.

Steamship "*Sucarseco*", her engines, boilers, etc., SUBMARINE BOAT CORPORATION,
Respondent,

(and two other cases)

WEST INDIA OIL COMPANY and J. H. SENIOR, Agent, AMERICAN INSURANCE COMPANY, *et al.*,
Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

FIRST POINT.

THE PETITIONER [*Toluma*] WAS LEGALLY OBLIGATED TO MAKE REPAIRS AT THE PORT OF REFUGE AND DELIVER THE CARGO, OR RESPOND IN DAMAGES TO CARGO; AND THE PETITIONER HAS THE PRIMARY RIGHT OF RECOVERY FROM THE TORT FEASOR, *Sucarseco*, FOR THESE EXPENSES, DIRECTLY RESULTING FROM COLLISION.

The collision physically damaged the *Toluma* and interrupted the *Toluma's* voyage to the extent of requiring the

Toluma to proceed to a port of refuge in order to make repairs of collision damage. As a common carrier of cargo, *Toluma* was substantially an insurer, bound to make safe delivery at destination, and, consequently, apart from any considerations of adjusting expenses as between *Toluma* and her cargo by way of General Average, *Toluma* was obligated by law to complete her voyage, or sustain the consequential losses. *The Niagara* v. *Cordes*, 21 How. [62 U. S.] 7, pp. 28, 29; *The Maggie Hammond*, 9 Wall. [76 U. S.] 435, p. 458; *The Lady Pike*, 21 Wall. [88 U. S.] 1, pp. 14-15; *Liverpool Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397, pp. 440-1; *The Irrawaddy*, 171 U. S. 187, pp. 190, 195-6.

Under the principle of "*restitutio in integrum*," the expenses incurred by *Toluma* constitute an element of the damage recoverable direct from the tort feasor, *Sucarseco*, by *Toluma;* and, *Sucarseco* is *primarily* liable to *Toluma* for these expenses. *The Baltimore*, 8 Wall. [75 U. S.] 377, p. 385; *Williamson* vs. *Barrett*, 13 How. [54 U. S.] 101 (411), p. 110 (416); *The Conqueror*, 166 U. S. 110, p. 125; *The Margaret J. Sanford* (C. C., S. D. N. Y.), 37 Fed. 148, cases cited at page 152.

The ruling of the Circuit Court of Appeals here operates to deprive the petitioner of its right of action against *Sucarseco* for a portion of *Toluma's* damage comprised in the expenses which *Toluma* incurred, and paid, at the port of refuge.

SECOND POINT.

CARGO OWNERS WERE NOT OBLIGATED TO CONTRIBUTE TOWARD *Toluma's* PORT OF REFUGE EXPENSES UNDER THE MARITIME LAW OF GENERAL AVERAGE. THEIR OBLIGATION TO *Toluma* AROSE ONLY BECAUSE OF THE TERMS OF THEIR CONTRACT WITH *Toluma*, *i. e.*, THE JASON CLAUSE.

Since the *Toluma* was bound, as a common carrier, to complete her voyage, if reasonably possible to do so (as was the circumstance here), and was bound to make the necessary collision repairs at the port of refuge, in order to fulfill her obligations, cargo owners had the right to rely on *Toluma* to perform that duty, or respond in damages to cargo, cases *supra;* but, under the fundamental principle of the law of General Average, which prevents the Carrier from collecting contributions from Cargo toward expenses resulting from the negligence of the Carrier, Cargo owners were relieved of any liability whatever to contribute toward these expenses, although of a "general average nature." That principle of the law of General Average has been definitely established by this Court, in the case of *The Irrawaddy*, 171 U. S. 187, pp. 189-190, and 196-197.

The situation is then, that Cargo's only liability to contribute towards the expenses necessarily incurred by *Toluma* arose from the contract between the petitioner (*Toluma*) and Cargo owners, as expressed in the Jason Clause. R. 52. While that clause has been held to be valid by this Court, *The Jason*, 225 U. S. 32, that is, enforceable by and among the parties to the contract, it cannot and does not alter that fundamental principle of the law of General Average as above stated, ***The Irrawaddy, supra.***

Apparently the Circuit Court of Appeals has read into this Court's decision in the case of *The Jason*, 225 U. S. 32, an intention to overrule or modify its decision in the case of *The Irrawaddy*, 171 U. S. 187, and to the extent of engrafting into the law of General Average principles which are clearly unjustifiable.

Thus, it is said by the Court that by agreeing "to contribute in General Average though the Harter Act would otherwise excuse it from doing so," Cargo owners were thereby enabled to have the master act as Cargo's agent to make such sacrifices [incur expenses] as may be timely and effective to avoid greater loss. R. 86. Obviously, it did not require that Cargo should give such a consideration as waiving its rights to withhold contributions where the carrier is negligent, as the master was already obligated to act for Cargo's interests, if necessary.

The Court further states:

> "Since the Jason Clause is valid, it was lawful for the owners of cargo to ship it at their own risk so far as that clause made the risk theirs. And their liability to contribute in general average under this clause is in no true sense the less a general liability imposed by maritime law than it was when a general average situation was created as a matter of law merely by circumstances occurring on a voyage." R. 86.

That statement, so it is submitted, indicates a complete misconception of this Court's decisions in both *The Irrawaddy* and *The Jason*. The Circuit Court of Appeals implies that incorporation of the Jason Clause is coextensive with "a general liability imposed by maritime law," which, of course, is not so, certainly not as to parties in the position of *Sucarseco, i. e.*, strangers to the contract.

Finally, the Court concludes:

> "provided the legal relationship of cargo and carrier coupled with the occurrence of events for which the tort feasor is legally responsible creates a general average situation *that requires cargo to contribute*, it may then recover such contributions from the tort feasor, as in *The Energia*,* *supra*." R. 87. (Italics ours.)

That statement further confirms a conclusion that the Circuit Court of Appeals regards the decision in the case of *The Jason* as tantamount to overruling the previous decision of *The Irrawaddy;* otherwise, it shows that the Circuit Court of Appeals regarded the "legal relationship" established purely by the private contract as one which a tort feasor, stranger to the contract, must know or contemplate at his peril. *Post*, p. 18.

It is believed that a reading of the opinion of the Circuit Court of Appeals will disclose a confusion of a right under private contract with a right under maritime law, which is the basic error in the decision. In view of the two decisions of this Court, however, in the two cases cited, *i. e.*, *The Irrawaddy* and *The Jason*, it seems plain that the situation requires clarification, as the decision now stands.

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* Referred to on pages 22 and 23, *post*.

THIRD POINT.

THE LIABILITY TO CONTRIBUTE TO *Toluma's* EXPENSES WHICH CARGO OWNERS ASSUMED BY AGREEING TO THE JASON CLAUSE DOES NOT CONFER UPON CARGO OWNERS ANY RIGHT OF RECOVERY FROM OWNER OF *Sucarseco*, WHICH WAS A STRANGER TO THE CONTRACT.

The Jason Clause being no more than a private contract* limited in effect to the parties among whom it was made, *i. e., Toluma* and owners of Cargo on *Toluma;* it must follow that Cargo owners are squarely in the position of one who having sustained a loss solely because of his contract with another, seeks to recover that loss from a third party, whose tort would not have caused the loss [to Cargo owners] except for the terms of his contract, which were unknown to the tort feasor. The alleged damage is too remote to be actionable against *Sucarseco,* as has been well settled by the authorities. *Robins* vs. *Flint,* 275 U. S. 303; *Insurance Co.* vs. *Brame,* 95 U. S. 754; *The Federal No. 2* (C. C. A., 2nd Cir.), 21 Fed. (2d) 313; *The Steel Inventor* (D. S., S. D. N. Y.), 36 Fed. (2d) 399, p. 401; *Dale* v. *Grant,* 34 N. J. L. 142; *Anthony* v. *Slaid,* 52 Mass. 290; *Connecticut Insurance Co.* v. *New York R. R. Co.,* 25 Conn. 265; *Milton* v. *Story,* 11 Vermont, 101; *Rockingham Mutual Fire Ins. Co.* v. *Bosher,* 39 Me. 253; *Brink* v. *Wabash Railroad Co.,* 160 Mo. 87, and cases cited therein; also, *Elliott Steam Tug Co., Ltd.* v. *The Shipping Controller* (Court of Ap-

* Clause 12 of the Contract (Bill of Lading) incorporates the special rules of adjustment of General Average known as York-Antwerp Rules of 1890 and Antwerp Rule of 1903. These are not in strict accordance with American practice generally. See Appendix.

peal), [1922], 1 K. B. 127, 139, 142; *Remorquage* v. *Bennetts* [1911], 1 K. B. 243; *Anglo-Algerian S. S. Co., Ltd.* v. *The Houlder Line, Ltd.* [1908], 1 K. B. 659; *Earl* v. *Lubbock* [1905], 1 K. B. 253; *Simpson* v. *Thomson* [1877], L. R., 3 App. Cas. 279; *Cattle* v. *Stockton Waterworks Co.* [1875], L. R., 10 Q. B. 453.

This Court, by Mr. Justice Holmes, in the case of *Robins* v. *Flint*, *supra*, stated, at pp. 308-309:

> "But suppose that the respondent's loss flowed directly from that source. Their loss arose only through their contract with the owners—and while intentionally to bring about a breach of contract may give rise to a cause of action, *Angle* v. *Chicago, St. Paul, Minneapolis & Omaha Ry. Co.*, 151 U. S. 1, no authority need be cited to show that, as a general rule, at least, a tort to the person or property of one man does not make the tort feasor liable to another merely because the injured person was under a contract with that other, unknown to the doer of the wrong. See *Savings Bank* v. *Ward*, 100 U. S. 195. The law does not spread its protection so far. A good statement, applicable here, will be found in *Elliott Steam Tug Co., Ltd.* v. *The Shipping Controller* [1922], 1 K. B. 127, 139, 140. *Byrd* v. *English*, 117 Ga. 192. *The Federal No. 2*, 21 F. (2d) 313."

The case of *The Federal No. 2*, *supra*, which was a decision of the Circuit Court of Appeals for the Second Circuit, disallowed a claim of a shipowner against another tortious vessel owner, for expenses incurred for maintenance and cure of a seaman injured by the latter vessel, on the ground that the damage arose out of the contractual relationship between the shipowner and the seaman, although the expenses incurred directly resulted from the

injury. It is difficult to see how the Court can reconcile the present decision with its own decision in the case of *The Federal No. 2.* The distinction sought to be made by the Court was that in the present case the collision with the tortious *Sucarseco,* "was a direct contributing cause of the loss which was sustained by cargo." R. 86. The answer is that Cargo's "loss" arose solely by reason of its contractual relationship to its carrier, *Toluma.*

The District Judge summed up the situation of Cargo owners as follows:

> "Their loss arose only because of their contract with the carrier. The fact that the *Sucarseco* injured the *Toluma* does not make it liable to persons who incurred losses because of contracts with the owner of the *Toluma* that were rendered burdensome because of the injury. In the eye of the law such damages are too remote." (Citing cases.) R. 63.

FOURTH POINT.

SUCH RIGHTS AS CARGO OWNERS MAY HAVE HERE TO RECOVERY OF GENERAL AVERAGE CONTRIBUTIONS ARE SECONDARY TO *Toluma's* RIGHT OF RECOVERY FROM *Sucarseco,* AND DERIVATIVE ONLY.

According to Lowndes' General Average, 6th Edition, Introduction, the practice now recognized in maritime law as the law of General Average arose because of the need of insuring or indemnifying the several partners to a marine venture against loss and expenses incurred for the common benefit. General average is in reality a method of mutual protective insurance, therefore, and as stated in Cole's "General Average Law and Rules", it is a method of

"arriving at the same result which might be reached by the alternative plan of insurance". Recognizing this analogy, both the Circuit Court of Appeals of the Second Circuit, and the District Court of the Southern District of New York, have applied the principle of subrogation to the collection (refund) of Cargo's general average contributions. *Pool Shipping Co., Ltd.* vs. *United States*, 33 Fed. (2d) 275; *Ralli* v. *Societa Anonima*, 222 Fed. 994.

In the case of *Pool Shipping Company*, the steamship *Clearpool* was allowed recovery as part of the collision damages, of certain items toward which it had compelled contribution in general average from its cargo. In that case, however, the *Clearpool* was not at fault, and there was not any question as to the obligation of Cargo to contribute under the law of General Average. The Court regarded the tortious colliding vessel as "primarily liable" and the Cargo as "secondarily liable", to the *Clearpool;* and, that Cargo was "entitled to subrogation", so that "the recovery to the extent of any amount theretofore contributed by Cargo would be for its account". P. 277.

Also, in the case of *Ralli* vs. *Societa Anonima*, 222 Fed. 994, the late Circuit Judge Mayer, then sitting as a District Judge, invoked a similar analogy in determining Cargo's "refund" from its own carrier, of portions of collision damage recovered by the carrier from the non-carrying vessel. In that case which also arose from a collision, the suit was by Cargo on one vessel to recover from that vessel the proportion of its general average contributions, which had been recovered in part from the non-carrying vessel; and, the Court awarded to Cargo only that proportion of Cargo's contributions for which recovery had been made from the other (non-carrying) vessel (*i. e.*, one-half of Cargo's contributions).

These Courts thus clearly distinguished between the *direct* right of the carrier to recover all general average expenses from the tortious non-carrier, and the *derivative* right of Cargo owners making contributions to this carrier to recover back from the carrier only that proportion of their contributions which carrier directly recovers from the non-carrier. That is the logical and equitable application of the principles of marine insurance to the situation here. Cargo owners, as insurers *pro rata* of the expenses of a general average nature become *subrogees,* and, *"in any form of remedy"*, they can take only so much as the insured (*Toluma*) may take. *Phoenix Ins. Co.* vs. *Erie Transportation Co.*, 117 U. S. 312, p. 321. In the *Pool* case, *supra,* it so happened that they secured a refund in full, because the non-carrier was solely at fault; but, in the *Ralli* vs. *Societa* case, where both vessels were at fault, as here, they could take only *one-half,* which represented the quantum recovered directly by their carrier.

If the principle of single liability had been applied to the *Ralli* case, instead of adjustment on a basis of cross-liability, the recovery (refund) would have been proportionately less. *The North Star,* 106 U. S. 17, pp. 22, 28-29. The principle of single liability should apply here.

The analogy of the two decisions above cited to the present case is that Cargo owners, as insurers of *Toluma's* port of refuge expenses, *pro tanto,* cannot stand in any better position *vis-a-vis Sucarseco* in respect of the *quantum* of recovery than does *Toluma;* and, that Cargo's rights are subordinate to *Toluma's* rights, and derivative from *Toluma's* rights. That is, Cargo owners must be satisfied with the rights of a "subrogee" to take back from *Toluma* only Cargo's ratable portion of *Toluma's* recovery.

The District Court in the present case applied the insurance analogy and concluded that Cargo's "only basis of recovery against the other vessel is by subrogation to the right of the carrier," R. 63; and that "if the cargo owner has made good to the carrier part of the loss incurred, the carrier on later recovery against the other vessel must account to the cargo owner for a proportionate amount when the damages have thus been diminished." R. 62.

The Circuit Court of Appeals, disregarding the controlling principle of the law of General Average as announced in the case of *The Irrawaddy, supra, ante*, p. 14, and despite the authoritative decisions as to remoteness of Cargo's claim here against *Sucarseco, ante*, p. 17, invoked its early decision in the case of *The Energia*, 66 Fed. 604 to support its conclusion that Cargo's general average contributions stood on the same plane as a direct physical damage to cargo inflicted by *Sucarseco*, and that Cargo owners could therefore recover general average contributions from *Sucarseco*. R. 83.

The case of the *Energia* was considered by the District Judge, and he properly concluded that: "The case did not involve any of the questions presented here." R. 63.

In the case of *The Energia*, that vessel incurred port of refuge expenses because of a collision, and Cargo laden on board the *Energia* was required to contribute toward these expenses in General Average, under the English law, governing the place of destination of Cargo. As a result of a trial on the liabilities, as between the two colliding vessels, the *Energia* was held solely at fault, 56 Fed. 124. In a subsequent suit brought by Cargo against its Carrier, *Energia*, the Harter Act being not then in force (at collision), and the *Energia* not having any statutory defense,

Cargo was allowed recovery of all its damages, both physical damage and general average contributions, direct from *Energia.* The tort of the *Energia* there directly caused a situation which obligated Cargo, by force of the law of General Average, to pay its proportion of the port of refuge expenses. That is not the situation here, because Cargo was not obligated under the law of General Average, *The Irrawaddy, supra,* to make the contributions. The question is not presented here as to whether or not Cargo could recover from *Sucarseco* if Cargo had been obligated to make contribution under the law of General Average. On the contrary, the question is presented as to whether or not Cargo may recover from the joint tort feasor, *Sucarseco,* contributions in General Average which it was not obligated to pay to *Toluma* under the law of General Average. Certainly the ruling in the case of *The Energia* cannot be controlling in a situation where Cargo seeks to enforce against a third party tort feasor, who is a stranger to the contract (Jason Clause), losses which it sustained only by reason of its contract with its Carrier, *Toluma. Ante,* p. 17.

Nor do the decisions in *Erie & Western Trans. Co.* v. *Chicago,* 178 Fed. 42, and *Gray's Harbor Tugboat Co.* v. *Petersen,* 250 Fed. 956, cited in the Court's opinion, R. 83, support its ruling here. In both cases (collisions) the innocent *carriers* were allowed recovery of general average expenditures from the solely tortious *non-carriers,* where the General Average was compulsory under the law of General Average, and not the creation of a private contract (Jason Clause). Far from upholding the Court's ruling, these cases argue against it, for they support the principle that the carrier and not the Cargo Contributors have the *primary* right of recovery from the tortious colliding vessel.

The Court also cited the English case of *The Minnetonka* [1905], Prob. Div. 206, as supporting the Court's statement that "the same rule pertains in England." R. 83. The law of England cannot be applicable to the questions here, and "the same rule" could not obtain in England, because under English law Cargo may recover only one-half its damages from each of two vessels equally at fault in collision, or such percentage of its damages as may represent the comparative negligence of the two vessels, *The Measure of the Damages in Maritime Collisions*, 3rd Edition, by E. S. Roscoe, pages 20-22, and cases there cited; and, the law of England is substantially different to the American law, in respect of freedom of contract, *The Irrawaddy*, 171 U. S., pp. 194-195. English rulings cannot be paralleled with the American decisions on the questions here involved, therefore. But, the decision in *The Minnetonka* does not go so far as to hold that the Carrier's right of recovery is not the primary right, if asserted; and, the Court there undoubtedly regarded Cargo's right as derivative, and one of subrogation. The late Circuit Judge Mayer, in the case of *Ralli* vs. *Societa*, 222 Fed., pp. 999 and 1001, so regarded that decision. If this were not so, however, a decision of the Court of Appeal in England certainly could not be taken to justify our Circuit Court of Appeals in departing from principles so clearly announced by the Supreme Court as those here involved.

Finally, the decision of the Circuit Court of Appeals will result in upsetting long standing practices in adjustment of shipowners' liabilities *inter sese*,* and *vis-a-vis*

* The tabulated figures on page 1001 of the report of the decision in *Ralli* v. *Societa*, 222 Fed. 994, show that Cargo received back only one-half of Cargo's total contribution, and Judge Mayer stated that this conclusion had "support in the practice of average adjusters," p. 1001.

Cargo owners, and in the settlement of insurance liabilities; and will create multiplicity of suit and confusion in final adjustments of recoveries, as in some cases there are hundreds of different cargo owners, each of whom would have to sue the tortious non-carrying vessel.

But, entirely apart from these practical considerations, the decision is so inconsistent with principles of law heretofore accepted by shipping interests generally, that it should be reviewed by this Court.

LAST POINT.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

WILLIAM H. MCGRANN,
Counsel.

New York, November 9, 1934.

APPENDIX.

During September, 1924, the International Law Association held its Thirty-Third Conference at Stockholm, Sweden. The report of that Conference forms a part of the record of the Association and is available at the office of the American Branch of the International Law Association, and at the law libraries. The maritime work at this particular Conference consisted in redrafting the York-Antwerp Rules of 1890, and formulating what we now know as the "York-Antwerp Rules of 1924."

American interests endeavored to defer the formulation and adoption of these new Rules at that time, as American interests concerned had not sufficiently considered the matter and were not prepared to take part in the proposed "codification" of general average practice. The American Steamship Owners Association (comprising the majority of American owners) deemed the matter of sufficient importance to be represented at the Conference, and to protest the final adoption of the rules at that time. There were representatives from all maritime nations, and, despite the American attitude, the rules were formulated, and are now used by a large number of foreign maritime interests.

Just as the York-Antwerp Rules of 1890 contain variances with the prior American practice, so the York-Antwerp Rules of 1924 are not wholly in accord with the American practice of general average adjusting.

The subject of the 1924 Rules occasioned a conference called by the Chamber of Commerce of the United States at Washington on March 16, 1925, which was attended by a large number of representatives of commercial, shipping, insurance, average adjusting, and legal interests. A Special Committee was appointed, which rendered a full report on the 1924 Rules, under date of May 15, 1925, and in which report several objections to the Rules were announced.

The United States Chamber of Commerce, on receipt of this report of the Special Committee, held a second confer-

ence on May 15, 1925, at which resolutions were adopted, containing among its preambles the statement that:

> "WHEREAS this Conference, on March 16th, 1925, adopted a resolution that the York-Antwerp Rules 1924 in the form submitted by the Stockholm meeting of the International Law Association are not acceptable to the commercial and shipping interests of the United States and that before the adoption and application of said Rules by American interests they should be modified in a number of important respects";

and otherwise expressing disapproval of the 1924 Rules.

The above action of the Chamber of Commerce was directed to effecting a reconsideration and possible modification of the Rules; but, on making representations to the Committee of the International Law Association the latter did not receive the suggestions favorably, and the attempt was unsuccessful.

Later, on February 15, 1925, the Special Committee of the Chamber of Commerce made a supplemental report, in which it was said:

> "We believe that all of our objections to the Rules are sound, and that some of them are so fundamental that they ought not to be waived."

The Committee then made certain specific recommendations as to incorporation in shipping documents of only parts of the Rules [together with the Jason Clause].

The result is that while the 1924 Rules are commonly accepted among foreign shipping interests, they are rarely used by American Shipping interests. Nevertheless, there are many instances of foreign ships trading to American ports where the ship and cargo agree by contract to adjust general averages under the 1924 Rules. So, a situation is possible, and indeed probable, whereby an American owner whose ship collides with a foreign ship would be called upon

to pay a general average expense adjusted under a rule which would not be acceptable to the American shipowner, that is, *if cargo on the foreign ship (as here) should be allowed to impose its private contract with a foreign ship upon an American shipowner, whose ship has the misfortune to collide with the foreign ship.*

The situation outlined above presents cogent reasons for disallowing direct recovery from the non-carrying vessel, otherwise the carrier and the cargo carried may impose upon the non-carrier special rules for adjusting general average, not known to nor contemplated by the non-carrier, and which might not be acceptable to the latter if it were contracting as a carrier with its own cargo.

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Supreme Court of the United States

AKTIESELSKABET "CUZCO", as owner of the Norwegian Steamship *"Toluma"*, Petitioner, *vs.* Steamship *"Sucarseco"*, her engines, boilers, etc., SUBMARINE BOAT CORPORATION, Respondent, (and two other cases) WEST INDIA OIL COMPANY and J. H. SENIOR, Agent, AMERICAN INSURANCE COMPANY, *et al.*, Respondents.	OCTOBER TERM, 1934. No. 524.

BRIEF FOR THE PETITIONER.

STATEMENT OF THE CASE.

I. *The Jurisdiction.*

This cause comes before this Court on a writ of certiorari to the Circuit Court of Appeals for the Second Circuit filed pursuant to the provisions of the United States Code, Title 28, Section 347 (a), on November 10, 1934, and granted on December 3, 1934 (R. 61).

II. *Reference to Opinions Below.*

The Opinion of the United States District Court for the Southern District of New York is reported in 4 Fed. Supp. 344.

The Opinion of the Circuit Court of Appeals for the Second Circuit is reported in 72 Fed. (2d) 690.

III. *The Record.*

The case arises out of a collision between the Norwegian steamship *Toluma*, owned by this Petitioner, and the American steamship *Sucarseco*, which occurred at sea, off the Atlantic Coast, on the night of November 22, 1928.

The Record consists of the various pleadings filed on behalf of the respective vessel owners, and of owners of Cargo on the *Toluma* (R. 3-24); a Stipulation of Agreed Facts (R. 28), which incorporates the contract of carriage between the *Toluma* and her Cargo (R. 31-32A); a General Average Agreement (R. 33); and a (separate) General Average Statement; also, opinions of the United States District Court, Southern District of New York (District Judge Robert P. Patterson) (R. 36), and of the United States Circuit Court of Appeals (Circuit Judges Manton, Swan and Chase) (R. 51).

It is not sought to review here any question of negligent navigation or seaworthiness, as it is agreed that the collision was caused by faults or errors of navigation on the part of both vessels; and, that both vessels were seaworthy (R. 28). The matter involved here concerns solely the question of law as to whether or not the owners of Cargo on the *Toluma* have a cause of action enforceable (directly) against the owner of the non-carrying vessel, *Sucarseco*, for recovery of contributions paid to the Petitioner, as

owner of the carrying vessel, *Toluma,* on account of expenses of a general average nature, and under the circumstances here.

IV. *The Facts.*

At the time of the collision, on the night of November 22, 1928, the *Toluma,* owned by Aktieselskabet Cuzco, the Petitioner, was proceeding on a voyage from New York to South American ports, via Norfolk, Va., with a general cargo, having left New York on November 17, 1928, and Norfolk on the early afternoon of November 22, 1928. The *Toluma* was being operated as a common carrier. The other colliding vessel, the *Suçarseco,* owned by Submarine Boat Corporation, was bound from New York to Pacific Coast ports, via the Panama Canal, with a general cargo, and was also being operated as a common carrier.

Both vessels sustained physical damage by reason of the collision, but there was not any direct physical damage to the cargo on either vessel.

The *Sucarseco* proceeded on her voyage, but, the *Toluma,* having sustained damage which it was deemed necessary to repair, put back into Norfolk, Va., to effect the collision repairs. Part of the cargo on the *Toluma* was there discharged, and, the repairs having been effected, the cargo was reloaded, and the *Toluma* resumed her voyage and made delivery of the cargo to the several ports of destination.

The contract of carriage between the *Toluma* and Cargo on board the *Toluma,* contained a clause, numbered "12", (R. 31, 32A), known as the "Jason Clause", and which is here reproduced in full:

"12. General average shall be adjusted and payable according to York-Antwerp Rules of 1890 and Antwerp Rule of 1903, and as to matters not therein provided for, according to the laws and usages at the port of New York, or at shipowner's option, at last port of discharge. The general average in every instance shall be prepared by average adjusters selected by the shipowner. In case of danger, damage or disaster resulting from accident or from faults or errors in navigation or in the management of or from any latent or other defect of the vessel, her machinery or appurtenances, from unseaworthiness, even though existing at the time of shipment or at the beginning of the voyage, if the defect or unseaworthiness was not discoverable by the exercise of due diligence and if the shipowner shall have exercised due diligence to make the vessel seaworthy and properly manned, equipped and supplied with respect to the matters concerned in the aforesaid danger, damage or disaster, then the shippers, consignees or owners of the cargo or the holders of this bill of lading shall nevertheless pay salvage and any special charges incurred in respect of the cargo and shall contribute with the shipowners in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred for the common benefit or to relieve the adventure of any common peril, all with the same force and effect and to the same extent as if such accident, danger, damage or disaster had not resulted from or been occasioned by faults or errors in navigation or in the management of the vessel or by any latent or other defect or unseaworthiness. The shippers, consignees, owners of the cargo or holders of this bill of lading shall make a deposit in cash or give a satisfactory guaranty, as the shipowner or Master may determine, equivalent to the

proportion of such charges that may be estimated by the shipowner or Master to become due from the cargo. Salvage services rendered to the goods by another vessel owned by or in the service of the shipowner shall be paid for as fully as if such vessel were owned by or in the service of strangers."

In pursuance of the terms of that Clause, a General Average Statement was prepared, which included all expenditures and disbursements incurred and paid by the Petitioner incidental to putting into the repair port to effect the repairs, and embracing about ninety-three items (R. 29).

The contributions stated to be due from the various interests were subsequently paid, as previously agreed by the terms of the Jason Clause.

V. *The Proceedings Below.*

(a) The original libel was filed on April 9, 1929, by the Petitioner, Aktieselskabet Cuzco, as owner of the *Toluma,* against the steamship *Sucarseco,* etc., claiming damages sustained by the Petitioner (Libelant), and the *Toluma,* "consisting of the cost of repairs, demurrage, *cost of discharging cargo to effect repairs, and other incidental and consequential damages* • • •," *i. e.,* including all expenditures made by the Petitioner at the repair port (R. 5).

(b) A cross libel was filed on December 9, 1929, by Submarine Boat Corporation, as owner, and Transmarine Corporation, as charterer in possession, of the American steamship *Sucarseco,* against the steamship *Toluma,* and Aktieselskabet Cuzco, as owner, and Grace Line, Inc., as charterer, claiming the physical and incidental damages sustained by the steamship *Sucarseco* (R. 6-8).

(c) A libel was first filed on December 29, 1930, by West India Oil Company, *et al.*, as "owner, shipper, and underwriters of certain cargo laden on the steamship *Toluma,*" against the Receivers for Submarine Boat Corporation and Transmarine Corporation, owner of the *Sucarseco;* and, the amended libel of West India Oil Company, *et al.*, against the Receivers was filed on February 9, 1933, claiming payments [*direct* from the non-carrier, *Sucarseco* interests], of their proportions of general average contributions made by the various cargo interests in pursuance of the General Average Statement and agreements (R. 16-21).

The above suits were consolidated by order, and were submitted to the United States District Court for the Southern District of New York, under the Stipulation of Agreed Facts, and exhibits incorporated therein, and with comprehensive briefs; and, the decision of the District Court, by written opinion filed on June 23, 1933, resulted in dismissal of the libel of West India Oil Company, *et al.*, against the Receivers (*Sucarseco*), but provided for recovery back of a proportionate part of Cargo's contributions in general average, which were recoverable by the Petitioner as a part of its "collision damages" (R. 40, 42-43).

West India Oil Company, *et al.*, as owners, shippers and/or underwriters of Cargo laden on the *Toluma,* entered an appeal from that decision of the District Court, to the Circuit Court of Appeals for the Second Circuit, which resulted in sustaining the libel of West India Oil Company, *et al.* (cargo owners), and allowing a *direct* recovery from the Receivers (the non-carrying vessel *Sucarseco*) of the full amount of Cargo's contributions which they had agreed to make under the terms of the contract of carriage with the Petitioner (*Toluma*).

VI. *The Opinion of the District Court.*

The Opinion is reported in 4 Fed. Supp. 344.

The Court expressed the issue as follows:

> "The question is whether in a collision case where both vessels were at fault, the cargo owner may recover from the non-carrying vessel not merely the physical damage suffered by cargo but also the amount which he has paid as contribution in general average to the carrying vessel, liability for such contribution having resulted from the presence of the 'Jason Clause' in the contract of affreightment" (R. 37-38).

The Court stated:

> "The liability of a cargo owner to contribute in general average toward sacrifices or losses suffered by the shipowner is comparable to the liability of an insurer of maritime risks. Where the damage to hull is caused solely by the fault of a stranger, the primary liability to make the loss good is on the stranger, and the liability of the cargo owner to the ship owner in general average is no more than secondary. These views were set forth in *Pool Shipping Co.* v. *United States,* 33 Fed. 2nd, 275, 277 • • •" (R. 38).

On authority of the cases of *The Irrawaddy,* 171 U. S. 187, and *The Jason,* 225 U. S. 32, the District Court held that the cargo owner is not obliged to contribute in general average to sacrifices or losses of the carrier, where the collision, as here, was brought about by negligence of the carrier, unless there is an express agreement to do so, as contained in Clause 12, *i. e.,* the "Jason Clause"; and, the Court stated:

> "From these views it must follow that the cargo owner whose goods have not been injured but who has paid contribution in general average toward making good the loss suffered by his carrier in a collision with another vessel in which both vessels were guilty of negligent navigation has no direct right of action against the other vessel. His only basis of recovery against the other vessel is by subrogation to the right of the carrier" (R. 39).

As to the case of *The Energia,* 66 Fed. 604, relied upon by the Respondents (cargo owners), the Court concluded that: "The case did not involve any of the questions presented here" (R. 39).

Furthermore, that since the burden to contribute fell upon the cargo owners by reason of their agreement with the carrier, their loss arose only because of their contract with the carrier, and the District Court stated that: "In the eye of the law such damages are too remote", citing *Robins* vs. *Flint,* 275 U. S. 303; *The Federal No. 2,* 21 Fed. 2nd, 313; *Insurance Co.* v. *Brame,* 95 U. S. 754 (R. 39-40).

Finally, the Court held that the cargo owners would be entitled to get back from the *Toluma* (Petitioner) only "their proportionate part of one-half the damages allowed to the *Toluma* of a general average character" (R. 40).

VII. *The Opinion of the Circuit Court of Appeals.*

The Opinion is reported in 72 Fed. (2d) 690.

The Circuit Court of Appeals modified the decision of the District Court by awarding a full recovery to the Respondents (cargo owners) of all of their contributions toward the port expenses, as a direct right against the non-carrying vessel, *Sucarseco,* thus depriving the Petitioner

of its *(primary)* right to recover as a collision damage the port expenses which the Petitioner had incurred and paid, and which were thereafter made the subject of general average contributions from cargo owners to the *Toluma.*

The Circuit Court of Appeals predicated its decision on the proposition, as stated, that: "in a suit by cargo for collision damages, no distinction purely as an element of damage is to be made broadly between physical damage and damage sustained by cargo by reason of general average contributions" (R. 53), citing the case of *The Energia* (C. C. A.) 66 Fed. 604; and that the "principle" of that case is applicable here; and, so the Court stated:

> "Consequently, there can be no distinction in respect to general average contributions by cargo being recoverable as damages by cargo in its own right between a situation where a collision between ships is due to the sole fault of the carrying ship and one where both ships are at fault * * *" (R. 55).

[The case of *The Energia* is discussed in the following text, pp. 19-21, 41-43.]

The Court regarded the "Jason Clause" as a means whereby the cargo owner was enabled to have the master act "as its agent", and, "to secure that right, cargo agrees to contribute in general average though the Harter Act would otherwise excuse it from so doing", citing *The Irrawaddy,* 171 U. S. 187 (R. 56).

[The case of *The Irrawaddy* is discussed in the following text, pp. 15-18; and that of *The Jason* at pp. 22-24.]

The Court then apparently proceeded on the theory that incorporation of the Jason Clause (providing for general

average contributions despite negligence of the carrier) into the contract of carriage (between the carrier, *Toluma*, and its Cargo) had the same force and effect [even as to third parties] as if the liability to contribute had been imposed by maritime law; and, so the Court stated:

> "provided the legal relationship of cargo and carrier coupled with the occurrence of events for which the tort feasor is legally responsible creates a general average situation *that requires cargo to contribute*, it may then recover such contributions from the tort feasor, as in *The Energia, supra*" (R. 57). (Italics ours.)

Further, the Court did not accept the conclusions of the District Court, *i.e.*, that the right of cargo owners (Respondents) here was derivative, and secondary to those of the Petitioner (*vis-a-vis*, the *Sucarseco*); nor that the claim of Respondents arose by reason of its special contract with the Petitioner [incorporation of the Jason Clause into the contract of carriage]; nor that the Respondents were asserting a claim against a "stranger" [*Sucarseco*] to that special contract; but that the claim asserted was based on a tort to the Cargo committed by the *Sucarseco* (R. 57).

The Circuit Court of Appeals awarded the cargo owners full recovery against the owners of the *Sucarseco* on these conclusions, instead of, as did the District Court, awarding only such proportionate part of their contributions as the Petitioner might recover directly from the *Sucarseco* as "collision" damages.

VIII. *The Question at Issue.*

The sole question presented here is:

Whether a cargo owner, suffering no physical damage, and not liable as a matter of general maritime law for a general average contribution because the carrying vessel involved in a collision was negligent, may nevertheless sue and recover from the non-carrying vessel, although jointly negligent, a general average contribution paid to his own vessel solely because of a special contract between him and his own vessel, to make such a contribution, to which contract the non-carrying vessel was not a party.

The District Court succinctly expressed the issue as follows:

> "The question is whether in a collision case where both vessels were at fault, the cargo owner may recover from the non-carrying vessel not merely the physical damage suffered by cargo but also the amount which he has paid as contribution in general average to the carrying vessel, liability for such contribution having resulted from the presence of the 'Jason Clause' in the contract of affreightment" (R. 37-38).

Argument.

On behalf of the Petitioner, it will be argued here that:

The Petitioner's negligence having caused the port of refuge expenses, the Respondents would not have been obligated to contribute in General Average toward those expenses except for the Jason Clause in the contract of carriage.

The Respondents cannot rightfully recover from the owners of the *Sucarseco* the contributions made to the Petitioner only because of the contract of carriage, *i. e.*, the Jason Clause, to which contract the owners of the *Sucarseco* were not parties.

The Respondents' claim for refund of their general average contributions is derivative only, and not directly recoverable from the *Sucarseco;* and, they are entitled to recover back from the Petitioner only a proportionate share of the Petitioner's recovery from the *Sucarseco* of the items to which they contributed.

FIRST POINT.

THE PETITIONER'S NEGLIGENCE HAVING CAUSED THE PORT OF REFUGE EXPENSES, THE RESPONDENTS WOULD NOT HAVE BEEN OBLIGATED TO CONTRIBUTE IN GENERAL AVERAGE TOWARDS THOSE EXPENSES EXCEPT FOR THE JASON CLAUSE IN THE CONTRACT OF CARRIAGE.

(*a*) *General Aspect of the Situation.*

The Circuit Court of Appeals stated: "Since it is agreed that all of the contributions were of a general average nature in settlement of expenses properly includable in the average adjustment, we need not now pay further attention to that phase of the matter" (R. 54).

It may be added that it is also agreed that the items of expense towards which contributions were made were "collision" damages as well (R. 28-29).

There were numerous items of expense, but the more substantial amounts resulted from having to remove a

large part of the cargo in order to repair the *Toluma* (R. 30, (b), and Appendix I). It was necessary that the Petitioner (as owner of the *Toluma*) should remove the cargo in order to effect either temporary or permanent repairs, and whether or not the voyage was to be continued or abandoned. The situation is explained by the reports of the surveyors, pertinent extracts from which appear in "Appendix I," annexed hereto. The Petitioner paid the stevedoring, and wharfage expenses entailed, as it also paid for the labor and material used in repairing the physical damage to the vessel. Broadly viewed, the one was as much a part of the cost of repairing the vessel as was the other. That circumstance is material in considering the effect of the Petitioner's negligence in respect of collecting these expenses in General Average, as they fall within the classification of shipowners' "sacrifices" *Post*, p. 31; Appendix I.

The history and principles of the law of General Average were fully discussed by this Court in the case of *Ralli* v. *Troop*, 157 U. S. 386. Briefly stated, the object of a general average is to spread a loss or expense voluntarily incurred by one or more parties for the common benefit to save the whole from imminent danger, proportionately among all the parties to the maritime venture.

It was said by this Court, in *Ralli* v. *Troop, supra,* at page 400:

> "After a voluntary sacrifice of part of the adventure, and a consequent escape of the rest from imminent peril, the owner of the ship, or in his absence the master as his agent, has the duty of having an adjustment made of the general average, and has a maritime lien on the interests saved, and remaining in his possession, for the amount due in contribution

> to the owner of the ship; and the owner of goods sacrificed has a corresponding lien on what is saved, for the amount due to him. *Cutler* v. *Rae,* 7 How. 729, 731, 732; *Dupont* v. *Vance,* 19 How. 162, 168-171; *Strang* v. *Scott,* 14 App. Cas. 601, 606, 607; 3 Kent Com. 244."

So here the Petitioner caused a statement of General Average to be made, in which, as the Petitioner's "voluntary sacrifice," were included the costs of removing, storing and reloading the cargo, among a number of other items of expense, which the Petitioner paid. The "statement" was not issued until nearly a year after the event, the Petitioner's claim for reimbursement from Respondents having been protected in the meantime by their undertaking in the "Average Agreement" (R. 33). The contributions shown to be due by the statement were subsequently settled in accordance with the "statement" [adjustment of expenses].

It is conceded that that is the ordinary and proper procedure, either in cases where there is not any negligence on the part of any of the participating parties, or in cases where the parties have agreed to share the expenses despite that negligence; but the important question here is as to whether the Petitioner could have lawfully exacted from the Respondents their contributions towards the expenses, despite the Petitioner's negligence, and without the special contract, *i. e.,* the Jason Clause.

It is submitted that this Court's decision in the case of *The Irrawaddy,* 171 U. S. 187, has definitely answered that question in the negative.

(*b*) *The Rule of The Irrawaddy.*

The case of *The Irrawaddy* came before this Court on a certificate from the Circuit Court of Appeals for the Second Circuit. *Flint* vs. *Chrystal,* 88 Fed. 987. The question certified was:

> "If a vessel, seaworthy at the beginning of the voyage, is afterwards stranded by the negligence of her master, has the ship owner, who has exercised due diligence to make his vessel in all respects seaworthy, properly manned, equipped and supplied, under the provisions of section 3 of the act of February 13, 1893, a right to general average contribution for sacrifices made and suffered by him subsequent to the stranding, in successful efforts to save vessel, freight and cargo?" 171 U. S., pp. 188-189.

This Court stated: "*Our conclusion accordingly is, that the question certified to us by the Court of Appeals should be answered in the negative, and it is so ordered.*" P. 196.

That conclusion may be said to have been forecast by this Court's language and decisions in the cases of *Lawrence* v. *Minton,* 17 How. (58 U. S.) 100, at page 111, and *The Portsmouth,* 9 Wall. (76 U. S.) 682, at page 684.

The circumstances in *The Irrawaddy* were, that the vessel having been stranded through negligence in navigation, expenses were incurred and losses sustained in freeing her from the strand. Subsequently, a general average having been stated, cargo owners declined to pay by way of contribution to the shipowner certain of the expenses involved, these being the gross freight on cargo jettisoned, and the

damages to the vessel by sanding and by the flow of water into the engine room, which resulted from a voluntary operation of the engines in an effort to move and float her. *Chrystal* vs. *Flint*, 82 Fed. 472, p. 473.

It had been held by the District Court (Judge Addison Brown) that the shipowner was entitled to contribution from cargo, but apparently on the ground that because the Harter Act operated to relieve the shipowner from liability for damage to cargo due to negligent navigation, it thereby extinguished the negligence, and justified a recovery in General Average by the shipowner, as if there had not been any negligence. 82 Fed., pp. 474-475. Also, on the further ground that to hold otherwise would create situations "disastrous to cargo"; and, that "maritime policy and necessity" should forbid establishing a rule to the contrary (*i.e.*, depriving the shipowner of the right of contribution). 82 Fed., p. 477.

This Court, however, declined to accept that view. The Court first considered the effect of negligence of a participating party, in the law of General Average, apart from [*before* the enactment of] the Harter Act (Act of February 13, 1893, c.105. 21 Stat. 445; see *Appendix* II); and, the Court stated:

> "Not only is the ship owner excluded from contribution by way of general average *when the loss arises from the ship's fault*, but he is legally responsible to the owner of the cargo for loss and damages so occasioned." Pages 189-190. (Italics ours).

The Court then considered the effect of the provisions of the Third Section of the Harter Act (Appendix II) in its bearing on the general rule above quoted, and decided

that the Harter Act did not alter the rule with respect to the carrier, *i.e.*, did not confer upon the carrier any right to exact general average contribution from cargo, where the carrier was guilty of negligence inducing the general average expenses. Pages 196-197. The shipowner was, therefore, not allowed recovery from cargo of the shipowner's "sacrifices" (expenses and/or losses).

Perhaps it is unnecessary to go any further, for the American law on this general proposition must be regarded as definitely settled by the pronouncement of this Court. However, it may be added that the codes of European and South American countries, with few exceptions, announce the same principle. The law of England is to the same effect. Lowndes' General Average, Sixth Edition, "Comparative Table of the Laws of General Average", Preface, page XXXIV, and Appendices A to Y, pages 419-731. [Appendix III attached.]

It may also be remarked that the dissenting opinion in the case of *The Irrawaddy, supra,* page 196, was based on the conclusion (held to be erroneous by the Court) that the Third Section of the Harter Act eliminated altogether the question of negligence of navigation, which was the conclusion, [also erroneous] of the District Court. Mr. Justice Brown, who wrote the dissenting opinion, had, nevertheless, previously decided, sitting as a District Judge in the case of *The Ontario* (D. C. E. D. Mich.) 37 Fed. 220, that the shipowner whose vessel is stranded by negligent navigation could not recover [from his insurance company] his damages and expenses of a general average nature in releasing the vessel, (*before* the Harter Act), stating, at page 222:

> "If this were an action by the ship-owner against the owner of the cargo for a general average con-

> tribution, we apprehend that it would be a sufficient answer to show that the necessity for the sacrifice was occasioned by the negligence or unseaworthiness of the ship. We understand the law to be as stated in Gourl. Gen. Av. 15, that 'if the necessity for the general average act arises through the unseaworthiness of the vessel, the *vice propre* of the cargo, or the negligence or barratry of the master or crew, no contribution generally would be due. If the danger and the necessary sacrifice are produced by the fault of the vessel or captain, and the vessel appears as a claimant for contribution, it would seem a proper answer that he by whose neglect the loss had been produced should bear it without relief.' See, also, Lowndes Av. 138; *Chamberlain* v. *Reed*, 13 Me. 357; *The Ann Elizabeth*, 19 How. 162; *Ross* v. *The Active*, 2 Wash. C. C. 226; *The Jenny Jones*, Deady, 82; *Bentley* v. *Bustard*, 16 B. Mon. 643; *The Norway*, Brown & L. 377; *Schloss* v. *Heriot*, 14 C. B. (N. S.) 59."

[Parsons On Shipping, Vol. I, pp. 353, 357, 411; and cases cited in Gourlie on General Average, par. 6, pp. 15-16, to the same effect.]

In view of the reliance placed upon the case of *The Energia*, 61 Fed. 222, and 66 Fed. 604, by the Circuit Court of Appeals in the present case, it is to be emphasized that the rule laid down by this Court later in *The Irrawaddy*, *supra*, had been recognized by the District Court, Judge Addison Brown, and by the Circuit Court of Appeals for the Second Circuit, in affirming the District Court's decision in *The Energia*.

(c) *The Relevancy of The Energia.*

In that case, the *Energia* had collided with a schooner in the Lower Bay of New York, and was held solely at fault. Because of the collision damage, the *Energia* put back to New York (as a "port of refuge") for repairs, there discharged her cargo, made repairs, reloaded cargo, and proceeded on her voyage to Shanghai, her port of destination. Cargo's proportion of all the expenses at the "port of refuge," New York, in the nature of general average charges, were exacted by the shipowner from the consignees at Shanghai, under the law of the port of destination, which was the law of England (Great Britain). Later, in the District Court for the Southern District of New York, cargo owners sued for recovery back of the contributions thus made, and the recovery was allowed because the *Energia* had caused the damage by her own (sole) negligence. The Harter Act was not then available as a defence, not being in operation at the time of collision.

District Judge Addison Brown (who decided the case of *The Irrawaddy* in the District Court) expressed the same principle of the American law of General Average as was later announced by this Court in *The Irrawaddy, supra,* stating, at page 224:

> "The grounds of the general average charges in this case were the necessary services and expenses rendered to and for the ship and cargo upon their return to this port, as a port of refuge; the charges were made necessary by the collision, and by nothing else; the particular charges were for the cargo alone. If the adjustment of average could have been made here, those charges would not have been allowed against the cargo, because of the ship's fault

(*The Ontario,* 37 Fed. 220; Snow *v.* Perkins, 39 Fed. 335; Ralli *v.* Troop, 37 Fed. 890); but as the adjustment is lawfully made under a foreign law, which does not recognize any liability in the ship under the exceptions of negligence in the bill of lading, and therefore allows her to collect these charges from the cargo in the first instance, our law, which takes note of the foreign law as a fact, and as one of the circumstances of the voyage on which this collision occurred, must, in order to give complete restitution, allow the cargo owner to recover back the charge which the collision, under the foreign law of average adjustment, has imposed upon the cargo, because that charge was the necessary result of the collision according to the law of the destination upon the voyage on which the ship was engaged. This does not at all reverse the foreign law of adjustment; it simply recognizes that law as a fact, and the payment of average as a necessary result of the collision. Our law, as the law of the forum, must govern in the adjustment of damages upon a collision happening here (*The Scotland,* 105 U. S. 29, 30); and hence full restitution must be given according to our law alone."

While the above quoted remarks may be susceptible of interpretation that the learned Judge had in mind only the "particular charges," *i. e.,* some special charge against cargo, the context of the opinion shows that the charges of a "general average" nature were also included, page 223.

The Circuit Court of Appeals for the Second Circuit (the same Court which decided the present case), accepted the District Court's conclusions, stating, 66 Fed. 604, at page 608:

> "It only remains to consider the claim to be reimbursed for the general average and special charges exacted from the cargo upon adjustment at Shanghai. Upon this branch of the case, we concur in the reasoning and conclusion of the district judge, * * *"

then quoting excerpt from the District Court's opinion, as above.

The "reasoning of the District Judge" was that the cargo having been *obliged* to pay to the shipowner the contributions under the foreign law, had sustained a loss due to the tort of the shipowner, for which the latter was ultimately liable to cargo (under the American law then existing, *i. e.,* without the defense of the Harter Act); but it is plain that the District Court held the view that if the American law had been applicable to the general average situation, the tortious shipowner could not have enforced collection of the contributions from cargo in the first place. That is the law laid down by this Court later in the case of ***The Irrawaddy.***

In failing to recognize that principle announced by the District Court in *The Energia,* and apparently approved by this same (earlier) Court, it is believed that the Circuit Court of Appeals erred, and misconceived the real purport of the decisions in both *The Irrawaddy* and *The Energia.* Indeed, the learned Court seems to have disregarded that controlling circumstance (*i. e.,* the Petitioner's negligence) in the present case, and refers to *The Irrawaddy* case only casually and in connection with the Jason Clause. It is respectfully suggested that the Circuit Court of Appeals would have reached a different conclusion, if the principle of the law of General Average settled by *The Irrawaddy* had been applied here.

Since the Circuit Court of Appeals has coupled its two references to the case of *The Irrawaddy* with its conclusions as to the meaning and effect of the "Jason Clause" (R. 56), it is opportune to comment here on this Court's decision in the case of *The Jason,* 225 U. S. 32.

(*d*) *The Limited Purport of The Jason.*

The circumstances in the case of *The Jason* were that the Norwegian steamship Jason while bound from Cuba to New York with a general cargo, was stranded through the negligence of her navigators, the steamship being seaworthy in all respects. The vessel was relieved from the strand by the jettison of cargo, and the services of salvors; and the vessel was convoyed to New York, and there delivered the cargo.

The bills of lading (contracts of carriage) contained a clause of similar tenor to Clause 12 in the present case, now known as the "Jason Clause." *Ante,* p. 4.

Disputes having arisen between shipowner and cargo owners as to the apportionment of the expenses, cross libels resulted, the shipowner claiming contribution from cargo owners, and the latter declining to pay expenses incurred by the ship on the grounds of unseaworthiness and negligent navigation. The District Court dismissed both libels, 162 Fed. 56, that of the shipowner because of the finding that the ship was navigated negligently and stranded thereby, and applying the ruling of *The Irrawaddy,* 171 U. S. 187, but without giving effect to the "Jason Clause."

The case then went to the Circuit Court of Appeals for the Second Circuit, 178 Fed. 414; and that Court considered the effect of the "Jason Clause," and its validity, but

subsequently decided to certify the questions of law to this Court.

Accordingly, this Court took up the case on the certificate from the United States Circuit Court of Appeals for the Second Circuit, and arrived at the following answers to the certified questions:

> "1. Whether the general average agreement above quoted from the bills of lading is valid, and entitles the shipowner to collect a general average contribution from the cargo-owners, under the circumstances above stated, in respect of sacrifices made and extraordinary expenditures incurred by it subsequent to the stranding for the common benefit and safety of ship, cargo and freight."
>
> Answered "yes" (affirmative).
>
> "2. Whether, in view of the provisions of the third section of the Harter act the cargo-owners, under the circumstances above stated, have a right to contribution from the shipowner for sacrifices of cargo made subsequent to the stranding, for the common benefit and safety of ship, cargo and freight?"
>
> Answered "yes" (affirmative).
>
> "3. Whether the cargo-owners, under the circumstances above stated can recover contribution from the shipowner in respect of general average sacrifices of cargo, without contributing to the general average sacrifices and expenditures of the shipowner made for the same purpose."
>
> Answered "no" (negative).

After reviewing its decision of *The Irrawaddy, supra*, this Court reiterated that the Harter Act did not entitle a shipowner to share in the general average rendered

necessary by the shipowner's negligence, page 54; but, "so far as the Harter Act has relieved the shipowner from responsibility for the negligence of his master and crew, it is no longer against the policy of the law for him to contract with the cargo-owners for a participation in general average contribution growing out of such negligence", page 55; and, the Clause was, therefore, held to be valid.

The answers to the foregoing certified questions logically result, so that where the shipowner and cargo owners have contracted with and among each other in the terms of the Jason Clause, they may exact contributions in general average from each other, in a proper case of general average, despite the negligence of any of the parties, the right being reciprocal.

Nevertheless, the decision in *The Jason* case, to the foregoing effect, does not alter the rule in *The Irrawaddy* case; and, as applied to the situation in the present case, the conclusion from both cases is that the shipowner, Petitioner here, could not have enforced against the cargo owners, Respondents here, the collection of contributions to the shipowner for expenses incurred by the shipowner although of a general average nature, but for the fact that the shipowner and the cargo owners had incorporated the Jason Clause in the contract of carriage, and were bound by it.

In other words, *but for the Jason Clause* the Respondents need not have made any contribution to the shipowner toward the expenses which the latter incurred.

(e) *Errors and Inconsistencies of the Decision Here.*

It was said by the Circuit Court of Appeals here as to the Jason Clause that:

> "It affords a means by agreement for parties in the venture to give to the master authority to act as agent for cargo for the purpose of incurring general average expenses which he would not have under the Harter Act as shown by *The Irrawaddy*, 171 U. S. 187" (R. 56).

The meaning intended to be conveyed by these quoted words is not clear. *The Irrawaddy* certainly did not decide that the Harter Act operated to prevent the master from incurring expenses of a general average nature. On the contrary, the Harter Act was eliminated as a controlling influence, or as a factor, in applying the principles governing the American law of General Average. All that the Supreme Court decided was that the shipowner's negligence was not excused in a general average situation, and that the law of General Average with respect to negligence remains unchanged by the Harter Act.

If the Court intended to imply that the Jason Clause was necessary in order to bind the Cargo to a general average sacrifice, where the sacrifice was made to relieve the vessel (and Cargo) from a situation of peril induced by the negligence of the shipmaster, that is true.

It is also said that:

> "This Jason Clause is not in any real sense a diminution of the rights cargo would otherwise have. On the contrary it enables cargo to have the master as its agent at the time and place of the peril to act for it to make such sacrifices as may be timely and effective to avoid greater loss. And to secure that right cargo agrees to contribute in general average though the Harter Act would otherwise excuse it from so doing. *Irrawaddy, supra*" (R. 56).

These statements also seem to indicate a misconception of the principles underlying a general average.

Undoubtedly the Jason Clause may, and generally does, diminish "the rights cargo would otherwise have"; for, the shipowner, if negligent, may not exact contribution from Cargo towards the sacrifices and expenses which the shipowner incurs, although for the common benefit, under *The Irrawaddy;* so that, Cargo is not obligated to pay (contribute) to the shipowner to reimburse the latter. But, if the cargo owner agrees to do so by accepting the Jason Clause, Cargo is then bound by its contract (only) to make the contributions. In short, the Jason Clause deprives Cargo of a *right* it would otherwise have, to refuse contribution to the negligent shipowner.

Again, Cargo does not require the Jason Clause to enable the master to act as its agent, as the quoted words imply. As this Court has said, the master acts, "not for the shipowner alone, but also for the cargo owner." *Ralli* v. *Troop,* 157 U. S. 386, p. 397.

The last sentence of the quoted extract implies that Cargo, by subscribing to the Jason Clause and thereby enlisting the services of the master as its agent, undertakes to contribute in General Average (as a consideration for the master's services?) which Cargo would not have to do (*i. e.,* contribute) under the Harter Act.

It is not by force of ("under") the Harter Act that cargo would not have to contribute, but it is by reason of the negligence of the shipowner, under the basic principle of the law of General Average as announced in *The Irrawaddy.* That principle is apparently disregarded by the Circuit Court of Appeals throughout its opinion, and the distinction between an obligation imposed by law [*i. e.,*

the maritime law of General Average] and an obligation arising only by contract [agreement of the parties to the incorporation of the Jason Clause] is not recognized, nor applied.

Thus, the Circuit Court of Appeals, in continuing its discussion of the Jason Clause, stated:

> "And their" (cargo's) "liability to contribute in general average under this clause is in no true sense the less a general liability imposed by maritime law than it was when a general average situation was created as a matter of law merely by circumstances occurring on a voyage" (R. 56).

That statement implies that the conception and use of the Jason Clause in contracts of carriage has altered the maritime law of General Average, which, of course, is not justified by the ruling of this Court in the case of *The Jason,* 225 U. S. 32, and, *a fortiori,* of the ruling in the case of *The Irrawaddy.* Although "the responsibilities of the carrier were subject to modification by law," and it was competent that the Congress should modify these responsibilities by legislative enactment, as in the Harter Act, *The Jason, supra,* page 49; it does not follow that the parties to a maritime adventure by entering into a special contract such as the Jason Clause have thereby changed the law of General Average. If that were so, it would seem that this Court by holding that the Jason Clause is valid, in the case of *The Jason,* intended to overrule its decision in *The Irrawaddy,* which cannot be so. The Jason Clause is not any more than an agreement between and among the parties to the adventure to adjust expenses of a general average nature, and to share the losses, as if there had not been

any negligence inducing the general average acts and consequences. It is essentially a private and special contract, and is not binding on any third party "stranger" to the contract. *Post*, p. 34.

(*f*) *Respondents' Theory of Legal Effect of Jason Clause Is Untenable.*

Counsel for Respondents apparently concede the soundness of the Petitioner's major contention, that Respondents (Cargo) were not obligated to contribute towards shipowner's port of refuge expenses. Thus, it was stated by Counsel in Brief in Opposition to Petition for Writ of Certiorari that:

> "Possibly, in the absence of a Jason Clause, the cargo owners would not have been bound to contribute to expenses incurred by the master even though such expenses were of a general average nature; but neither would the master have been bound to incur them."

The last clause above quoted, however, interjects a conclusion which is plainly untenable; and, its acceptance shows the error of the Circuit Court of Appeals here, for that Court proceeded on the same erroneous conception of the legal effect of the Jason Clause.

Thus, the theory of Respondents (Cargo) is that a shipmaster whose negligence induced a situation of danger to all property in the adventure need not take any action [*i. e.*, incur extraordinary expense] to save the property entrusted to his care, unless the shipowner is assured (by Jason Clause) that the expenses will be shared. The proposition is answered by merely stating it. It is inconceivable

that such a conclusion should have support by any Court. Nor is it believed that the Respondents can find encouragement by interpretation to that effect of this Court's language in its opinion in the case of *The Jason, supra.* Although this Court there expressed the view that the master's duty (as agent of the shipowner) did not extend so far as to "call for a sacrifice of a part of the owner's property if necessary to save the cargo," page 54; nevertheless, this Court apparently approved the proposition (advanced on behalf of cargo in that case) that "the master is nevertheless bound to exert every effort to save the property, and if he fail in this duty, his owners are liable to the cargo for the resulting loss," provided that statement should be modified by insertion of the word "*reasonable*" before effort. *The Jason, supra,* p. 54.

In the earlier case of *The Portsmouth,* 9 Wall. [76 U. S.] 682, this Court stated, at page 687:

> "Were it necessary, it would be easy to show that the conduct of the master *after* the vessel was stranded was entirely unjustifiable. *It was his duty even then to take all possible care of the cargo. He was bound to the utmost exertion to save it.* Losses arising from dangers of navigation, within the meaning of the exception in the bill of lading, are such only as happen in spite of the best human exertions, which cannot be prevented by human skill and prudence. But in this case no effort was made to save the cargo." [Italics ours.]

It was there decided that the jettison of cargo was not a subject of general average as it might have been saved if the master had been diligent.

Undoubtedly, the master (or the shipowner) may not lightly divest himself of the duty of "care and custody" of

cargo entrusted to the vessel for safe delivery to destination (Section 1, Harter Act, Appendix II). That duty is the burden of the Common Carrier.

Moreover, the Jason Clause, *per se,* cannot impose a legal obligation on the shipmaster (owner) to incur [extraordinary] expenses of a general average nature, which he would not otherwise have, either as the shipowner's agent, or as the agent for Cargo, as seems to be the contention for Respondents (Cargo) here, and as the Circuit Court of Appeals manifestly assumed. All that the Jason Clause does is to provide for sharing such expenses *when* made, despite negligence inducing them, although they would not otherwise be shared. To hold otherwise, so it is submitted, would be tantamount to holding that the case of *The Jason* overruled the case of *The Irrawaddy,* which is not so.

(*g*) *The Expenses of Port of Refuge Would Be Paid by the Shipowner but for the Jason Clause.*

Perhaps it is too speculative to predict what the master might have done on this occasion "in the absence of a Jason Clause." He (or the shipowner) might have reasonably concluded that an abandonment of the voyage was justifiable, and that the cargo should be transshipped, in which event, the costs of transshipment would have been a charge against the freight (shipowner), ordinarily. *58 Corpus Juris,* p. 502, Sec. 837, and cases cited. He would have had to remove the cargo from the *Toluma;* and, although he would probably not have been put to the expense of storing it, and certainly not of reloading it on the *Toluma,* the expense of transferring to another vessel would have been his (*i. e.,* a charge on freight).

So, even without the Jason Clause, and without the assurance that expenses incurred at the repair port (primarily directed to repairing the vessel) would be shared, it seems reasonable to conclude that the master of the *Toluma* would (and should) have acted just as he did, *i. e.*, make port, repair the vessel and proceed on the voyage; or, he would (or should) have transshipped at the shipowner's expense (on his freight).

(h) The Port of Refuge Expenses Here Are Similar in Legal Effect to Those Disallowed in The Irrawaddy.

It has been argued on behalf of Respondents that the decision in *The Irrawaddy* "related only to physical sacrifices of the shipowner's property" and did not deal with expenditures in a "port of refuge". It is true that *The Irrawaddy* did not have to put into a "port of refuge" for repairs; but the distinction suggested is immaterial in application of the principle of *The Irrawaddy* to the present case.

The shipowner in *The Irrawaddy* had not only made a "physical sacrifice" of his engines (damaged while operating on the strand), voluntarily and for the common benefit of cargo and ship, but he also sacrificed freight money on the jettisoned cargo. When the shipmaster threw the cargo overboard, he threw with it his lien for the freight. That was in reality just as much an "expense" to the shipowner there, as was the expense of discharging (removing) cargo in the present case. It would be a fine distinction, indeed, to hold that the two sacrifices were not similar in legal effect.

But, the Respondents argue, the "port of refuge" expenses here (the major items, apart from repairs to the

ship, being removal and reloading of cargo) were incurred by the shipowner (partly) as agent for the cargo. So, in *The Irrawaddy,* in the same sense, were the expenses of repairing his damaged engine, and the loss (expense) of his freight money (partly) incurred as agent for the cargo. If, then, cargo's alleged obligation to reimburse the shipowner in the present case is to be predicated on the theory of agency for the cargo, the question arises—why would not the same theory apply to the circumstances of *The Irrawaddy?*

If the Respondents' contention is tenable here, the same contention would have been tenable in the case of *The Irrawaddy;* and, if the reasoning and conclusions of the Circuit Court of Appeals here (agency for cargo is stressed throughout its opinion) had been applied by this Court to the situation in *The Irrawaddy,* the shipowner there would have been allowed to recover from cargo the latter's "proportion" of the shipowner's expenses. The shipowner was *not* allowed to recover there [*The Irrawaddy*] because his negligence induced the expenses; so here, the Petitioner [shipowner] would *not* be allowed to recover the part of refuge expenses, because of his negligence, under the American law of General Average, *but for the Jason Clause.*

(*i*) *The Practical Utility of the Jason Clause.*

It would be fruitless to comment on the reasons for drafting and using the Jason Clause. Possibly it operates to the advantage of both shipowner and cargo. Following the decision of this Court in *The Irrawaddy,* as it did, the fair inference is that its ultimate object was to give to the shipowner the right to make a valid contract with cargo,

which would eliminate the consequences of the shipowner's prior negligence inducing expenses of a general average nature, as between and among the parties interested in that particular adventure.

Nevertheless, by holding that the Jason Clause is "valid," it cannot be inferred that this Court altered, or intended to alter, the underlying principles of the maritime law of General Average as applied by American Courts, and, particularly, that principle announced in the case of *The Irrawaddy*. Negligence inducing a general average must still prevent the tortious party from recovering his losses and expenses, unless, as here, he is fortunate enough to have made a special contract (such as the Jason Clause) with his co-adventurers whereby the losses and expenses are to be shared. The resulting benefit to the shipowner is due solely to his advantageous contract.

(*j*) *Conclusion.*

The foregoing considerations lead to the conclusion that the contributions toward the expenses incurred and paid by the Petitioner, as owner of the *Toluma*, at the repair port, could not have been exacted from the Respondents, as cargo owners, under the American law of General Average, because of the Petitioner's negligence; and, it was solely because of the special contract between and among the parties, *i. e.*, incorporation of the Jason Clause into the contract of carriage, that the Respondents became obligated to contribute.

That conclusion forms the premise to the Petitioner's further contentions that Respondents should not be allowed a direct recovery from the joint tort feasor, *Sucarseco*.

SECOND POINT.

THE RESPONDENTS CANNOT RIGHTFULLY RECOVER FROM THE OWNERS OF THE *Sucarseco* THE CONTRIBUTIONS MADE TO THE PETITIONER ONLY BECAUSE OF THE CONTRACT OF CARRIAGE, *i. e.*, THE JASON CLAUSE, TO WHICH CONTRACT THE OWNERS OF THE *Sucarseco* WERE NOT PARTIES.

(a) *The Opposing Contentions.*

The Respondents maintain that there is a cause of action against the tortious colliding vessel (owners), the *Sucarseco*, for recovery in full of the contributions made by them towards the port of refuge expenses, on the theory that they were obligated by law to make the contributions; and that the obligation arose because of a tort committed by the *Sucarseco* to their property.

The Petitioner contends that since there was not any obligation imposed by law [*i. e.*, the law of General Average] upon the Respondents, and since the Respondents contributed only because of the terms of the contract of carriage, *i.e.*, the Jason Clause, the Respondents cannot enforce the claim against the *tort feasor* who is not chargeable with privity in the contract, nor with contemplation of the consequences which might arise by reason of the special contract, nor with intention to cause a breach of such a contract.

(b) *The Rule of Remoteness.*

If the Petitioner's contentions as set forth in the preceding text are sound, it seems obvious that there need not be any further discussion of the issue; for it is too well settled to be questioned that one may not recover a

"damage" which he has sustained solely because of his contract with another, and which he would not have sustained but for that contract, from a third party who is necessarily a "stranger" to the contract. A long line of cases have followed that proposition, in various situations, viz.: *Robins* vs. *Flint,* 275 U. S. 303; *Insurance Co.* vs. *Brame,* 95 U. S. 754; *The Federal No. 2* (C. C. A., 2nd Cir.), 21 Fed. (2d) 313; *The Steel Inventor* (D. C. S. D. N. Y.), 36 Fed. (2d) 399, p. 401; *Dale* v. *Grant,* 34 N. J. L. 142; *Anthony* v. *Slaid,* 52 Mass. 290; *Connecticut Insurance Co.* v. *New York R. R. Co.,* 25 Conn. 265; *Milton* v. *Story,* 11 Vermont, 101; *Rockingham Mutual Fire Ins. Co.* v. *Bosher,* 39 Me. 253; *Brink* v. *Wabash Railroad Co.,* 160 Mo. 87, and cases cited therein; also, *Elliott Steam Tug Co., Ltd.* v. *The Shipping Controller* (Court of Appeal) (1922), 1 K. B. 127, 139, 142

It was attempted to distinguish the present case from the doctrine followed in the above cited cases in that the latter, so it was argued, dealt with "secondary damages sustained by the plaintiffs as a result of injury to the person or property of someone else". The distinction is not real; but, even so, the damages sustained by the "plaintiffs" here (Cargo), although they may have been consequential upon the collision between the carrier (the *Toluma*) and the *Sucarseco,* nevertheless, would not have resulted except for the setting into operation of the contract *voluntarily* entered into, by Cargo with *Toluma.*

(c) *The Cases on the Rule.*

Three (3) of the cases cited may be mentioned particularly, as illustrative of the application of the principle to the present case.

In the case of *Robins* vs. *Flint*, 275 U. S. 303, the steamship *Bjornefjord* was under time charter to Flint. It was the duty of the Owner to dock the vessel at stated times, payment of the hire to be suspended during the period necessary for docking. The Owner made a contract with Robins Dry Dock Company for docking, and certain repairs, to which contract the time charterer, Flint, was not a party. The Robins Company did not have any knowledge of the contract of charter at the time its contract with the Owner was made. During the course of the docking and repairs, the Robins Company (repairers) tortiously damaged the propeller of the vessel, necessitating extension of time in which to repair the propeller. The Owner and the Robins Company settled the damages as between the two, and later the time charterer, Flint, sued the Robins Company for loss of use of the vessel during the time of additional detention necessitated by repairing the propeller.

A recovery was allowed in both courts below, 13 Fed. (2d) 3; but, the Supreme Court reversed the lower courts, on the ground that the loss of the time charterer arose only by reason of its contract of charter with the Owner, and that the tort feasor, the Robins Company, while liable to the Owner for the latter's damage only, could not be held liable by the time charterer, Flint, since any right which Flint may have had arose from his contract with the Owner, which contract was not known to or contemplated by the Robins Company in making its contract with the Owner.

Mr. Justice Holmes, in delivering the opinion of the Court, stated, at pages 308-309:

> "The injury to the propeller was no wrong to the respondents but only to those to whom it be-

longed. But suppose that the respondent's loss flowed directly from that source. Their loss arose only through their contract with the owners—and while intentionally to bring about a breach of contract may give rise to a cause of action, *Angle* v. *Chicago, St. Paul, Minneapolis & Omaha Ry. Co.,* 151 U. S. 1, no authority need be cited to show that, as a general rule, at least, *a tort to the person or property of one man does not make the tort feasor liable to another merely because the injured person was under a contract with that other, unknown to the doer of the wrong.* See *Savings Bank* v. *Ward,* 100 U. S. 195. The law does not spread its protection so far. A good statement, applicable here, will be found in *Elliott Steam Tug Co., Ltd.* v. *The Shipping Controller,* [1922], 1 K. B. 127, 139, 140. *Byrd* v. *English,* 117 Ga. 192. *The Federal No. 2,* 21 F. (2d) 313." (Italics ours.)

The analogy of that case to the present case rests on the contract of charter, rather than on the contract for docking and repairs. The time charterer, Flint, was in the same position as Cargo on the *Toluma;* the Owner of the steamship *Bjornefjord* was in the same position as the owner of the *Toluma;* and, the Robins Company was in the same position as the *Sucarseco* interests. The injury (damage) inflicted by the *Sucarseco,* by reason of its tortious collision with the *Toluma,* was an actionable injury to the original libelant, the owner of the *Toluma,* this Petitioner, but not to Cargo in respect of Cargo's general average contributions, (a contractual obligation only).

The decision of the Circuit Court of Appeals of this Circuit in the case of *The Federal No. 2,* 21 Fed. (2d) 313, affirming the decision of the District Court, 14 Fed. (2d)

530, and cited with approval by the Supreme Court in the case of *Robins* vs. *Flint, supra,* also illustrates the legal situation here, as to remoteness of Cargo's claim against the *Sucarseco* interests (Receivers).

In that case, the tug *Federal No. 2* while towing the barge *Glooscap,* was charged with negligent management of the towline to the *Glooscap,* resulting in injury to one Parr, a member of the crew of the *Glooscap.* The owner of the *Glooscap* was obliged to pay certain hospital charges incurred in "maintenance and cure" of the injured member of the *Glooscap's* crew, which obligation arose from the contract of employment. The owner of the *Glooscap* then brought suit against *Federal No. 2* to recover the charges incurred, on the ground that the tort of tug *Federal No. 2* caused the injury to Parr, and rendered the tug liable for Parr's medical and hospital charges, paid by the owner of the *Glooscap.*

The District Court upheld exceptions to the libel, and dismissed the libel, stating, at page 531:

> "The right to maintenance and cure on the part of a seaman under our law *is contractual. The Hanna Nielsen* (C. C. A.), 273 F. 171; *The Bouker No. 2,* 241 F. 835, 154 C. C. A. 533." • • •
>
> *"It thus appears that the proximate cause of libelant's damage is the contract which it made with Parr, and I do not believe that the claimant can be held liable upon the producing of the contingency which makes the libelant liable under his contract."* (Italics ours.)

The Circuit Court of Appeals affirmed on the same grounds.

The English case cited by the Supreme Court in *Robins* v. *Flint, supra, i. e., Elliott Steam Tug Co., Ltd.* v. *The Shipping Controller* (Court of Appeal) (1922), 1 K. B. 127, 139, 142, involved a suit brought by charterers of the tug for compensation for damage done to their business by the requisition of the tug by the Admiralty, and its loss of use by the charterers. The suit was against the Shipping Controller (Admiralty), and the claim was disallowed. The words of SCRUTTON, L. J., at page 139, are pertinent:

> "At common law there is no doubt about the position. In case of a wrong done to a chattel the common law does not recognize a person whose only rights are a contractual right to have the use or services of the chattel for purposes of making profits or gains without possession of or property in the chattel. *Such a person cannot claim for injury done to his contractual right.*" (Italics ours.)

Further, at page 142:

> "But in my opinion there is a deeper objection to the appellants' claim based on the common law principles already stated, namely, that *the charterer cannot get any damages for the loss of his purely contractual rights, whether in property or business.*" (Italics ours.)

(d) *The District Court Properly Applied the Rule.*

The District Court here, having properly concluded that Cargo's contributions were made solely because of the Jason Clause, a contractual obligation only, without any obligation to make contribution otherwise, applied the rule of the foregoing cases, and held that Cargo's claim here could not be properly asserted against the *Sucarseco*, stating:

"In the eye of the law such damages are too remote" (R. 39).

(e) *The Circuit Court of Appeals Erroneously Discarded the Rule.*

The Circuit Court of Appeals, while reiterating the rule of remoteness generally, distinguished the present case on the ground that the tort of the *Sucarseco* "affected the *Toluma's* cargo", and, that: "It was a direct contributing cause of the loss which was sustained by cargo. It made the expenses necessary" (R. 56).

But, it might also be said of the case of *Robins* vs. *Flint, supra,* that the tort of Robins affected the charterer, and directly contributed to the loss which was sustained by the charterer, in losing the use of the vessel; and, it might also be said that the tort of the tug *Federal No. 2* was a direct contributing cause of the Glooscap (owner) having incurred hospital charges for "maintenance and cure" of the injured member of her crew, and that the tort made the expenses necessary. However, the three cases discussed above, and the present case, are identical in this respect, that a situation developed whereby a party incurred expenses or losses only because of his contract with another party, although the tort of the third party set in motion events which brought the contract into operation; still, the claim of the incidentally and contractually injured party is too remote to be enforceable against the third party tort feasor.

Further, the Circuit Court of Appeals stated:

"We cannot subscribe to the theory that the terms of the contract of carriage are of any concern to the tort-feasor, provided the legal relationship of cargo

> and carrier coupled with the occurrence of events for which the tort-feasor is legally responsible creates *a general average situation that requires cargo to contribute.* It may then recover such contributions from the tort-feasor as in *The Energia, supra.*" (Italics ours.) (R. 57.)

Again, if the Petitioner's contentions as set forth in the preceding text, under the First Point, are sound, the "general average situation" which may have arisen because of the collision did not "*require cargo to contribute*", because Cargo was not bound to contribute under the law of General Average. The only legal obligation of Cargo (Respondents) to contribute was that Cargo had undertaken to do so by contract with the Petitioner.

(f) *The Decision in The Energia is "Sui Generis", and Was Misapplied Here.*

The case of *The Energia,* 61 Fed. 222, affirmed (C. C. A. 2nd Cir.) in 66 Fed. 604, has been adopted as the keystone of the Respondents' case here, and has been accepted by the Circuit Court of Appeals as determinative of the question at issue in the present case. It has been discussed in the preceding text. *Ante,* pp. 19-22.

The District Court considered the relevancy of that case, and properly concluded:

> "*The case did not involve any of the questions presented here.*" (Italics ours.) (R. 39.)

A comparison of the questions presented in the two cases as paralleled below fully justifies the District Court's conclusion:

The Energia.	*Present Case.*
May cargo owners recover back from the solely tortious carrier, with which they were in contractual privity, contributions which they were obligated to advance to that carrier by force of the (English) law of General Average applicable?	May cargo owners recover primarily from a third party non-carrier, jointly at fault with the carrier, with which non-carrier they did not have any contractual privity, contributions which they were *not* obligated to pay by force of the (American) law of General Average applicable, and which they paid only under voluntary agreement with the carrier?

The vital difference in the two cases is at once apparent: in *The Energia* the recovery (back) of Cargo's contributions was sought (and obtained) directly from the carrier, and a tortious third party was not involved; while in the present case the initial recovery is sought directly from the tortious third party only.

The Courts in *The Energia* held that the contributions were obligatory under the English law, but it was said that they would *not* have been obligatory (payable) under the American law. 61 Fed. 222, p. 224; 66 Fed. 604, p. 608. *Ante,* pages 19-21. So, it must follow that but for the circumstance that the English law was applied, cargo owners on the *Energia* would *not* have been obligated to pay General Average, and the exaction of contributions would have been "illegal". Under American law, they would not have been allowed the shipowner in the first place, and there would not have been any necessity of a suit to recover them back.

But, it has been argued that the obligation in *The Energia* case also arose by reason of a contract. Even so, the parties (carrier and cargo) were in privity as to that contract. The tort feasor, shipowner, was therefore chargeable with knowledge of the consequences which his "tort" would impose on Cargo by way of damages. That is the important distinction between the decision in *The Energia,* and the circumstances of the present case.

In other words, the circumstances of *The Energia* take that case (and decision) *out of the rule* laid down in *Robins* vs. *Flint, supra,* and other cases cited to the same effect. The circumstances of the present case bring this case squarely *within the rule.*

(g) *The Decision of the Circuit Court of Appeals is Fundamentally Unsound in Not Distinguishing Between a Liability in Tort and One Only in Contract.*

It was of course necessary in order to justify its decision that the Circuit Court of Appeals in the present case should regard the "damage" (contributions) as the direct result of a "tort" committed by the non-carrier, *Sucarseco.*

It was argued in the Brief in Opposition to Petition for Writ of Certiorari, page 3, that Cargo's "loss" was not caused by their contract with the *Toluma,* but by the collision between that vessel and the *Sucarseco;* and again, that physical damage to the *Toluma,* "or any other damage directly caused by the collision, is, of course, not the subject of general average contribution". *Brief in Opposition,* page 9. It is then stated:

> "Contribution in general average is due not in respect of any damage sustained either by hull or

> cargo in the collision; but is due only in respect of sacrifices or expenses *voluntarily* incurred by the master, as the representative of all interests, *after the collision has occurred and for the sole purpose of averting further loss. Ralli* v. *Troop,* 157 U. S. 386, 406, 409; *Burton* v. *English* (1883), 12 Q. B. D. 218, 223."

The two positions seem hardly consistent; but, the latter quoted statement emphasizes the Petitioner's contention, that it was not really the *tort* which placed a liability upon Cargo (Respondents) to contribute, but it was the *Contract.*

The Circuit Court of Appeals apparently did not recognize the distinction which Counsel for Respondents (Cargo) have made.

Reverting to the case of *The Energia,* the learned District Judge apparently regarded the general average contributions in that case as "the direct and natural consequence of the collision" as had been stipulated by the parties, page 223; and, the contributions were dealt with as an "item of damage" as between the *Energia* and Cargo. Nevertheless, it is not at all clear from that decision, (it was not there necessary to distinguish), whether the cause of action sounded *in tort,* or in *contract.* In reality, the negligence of the *Energia* constituted a breach of its contract, and the damage was recoverable as such, since the negligence clause there was invalid under the American law, and there was not any defense under the Harter Act. The situation was similar to that of a carrier who collects his full freight on lost cargo [primarily] by the terms of his contract of carriage; but, who must repay that freight if the cargo was lost through negligence

of the carrier, that is, through the carrier's breach of his contract.

It is believed that the error in the decision as it stands becomes apparent if this distinction between an action in tort and an action in contract is considered. As has been succinctly stated in "Burdick's Law of Torts", page 14:

> "The test to be applied is the nature of the right which has been invaded. If this right was created by the agreement of the parties, the plaintiff is limited to an action *ex contractu*. If it was created by law he may sue in tort."

In short, such "damage" [contributions] as the Respondents sustained here was *"ex contractu"*. They have not any cause of action against the *Sucarseco in tort.*

(h) The Authorities Cited in the Opinion of the Circuit Court of Appeals Do Not Support Its Conclusions.

1. *Ralli, et al.* v. *Societa Anonima di Navigazione, etc.* (D. C.) 222 Fed. 994.—A collision had occurred between the steamship *Aristea* and the steamship *Groningen,* due to faults in the nagivation of *both* vessels, resulting in equal division of the total damage. P. 996.

The *Aristea,* as a result of damage sustained in the collision, had to put back to her port of departure, *i. e.,* London, and expenses were incurred of a general average nature, which induced a general average adjustment as between the *Aristea* and her cargo. P. 995. Among the damages recovered by the *Aristea* from the *Groningen,* were items of damage which had been included in the general average statement and adjustment, to which cargo on the *Aristea* had contributed. The owners of the *Aristea*

received (credited with) from the *Groningen* one-half of the total of items of a general average character. Apparently the owners of the *Aristea* did not refund any part of the amount thus recovered from the *Groningen,* and suit was instituted by cargo owners on the *Aristea* against the owner of the *Aristea* for an accounting.

The Court stated at page 999:

> "The *Groningen* and the *Aristea* having paid each to the other one-half of the other's damage (by settlement of account), and the *Aristea* having thus received back from the *Groningen part of the loss* for which the cargo owners had contributed to some extent, the cargo owners now ask that the *Aristea* return to them *their just proportion.*" (Italics ours.)

The Court proceeded on the assumption that: "the owners of cargo shipped on her *were obliged* to contribute to her loss," referring to the *Aristea.* P. 999. [Not so in the present case.]

The Court allowed Cargo a recovery representing its *ratable proportion* of the one-half recovery which had been allowed its carrier, owner of the *Aristea,* as an item of the latter's damage asserted against the *Groningen;* that is, Cargo received a *refund* from *Aristea's* collection of one-half (50%) of Cargo's contributions in General Average to the *Aristea.*

That decision does not mean that cargo owners there could have recovered directly, as in tort, from the non-carrying vessel, the *Groningen* (like *Sucaresco* here). It means only that as a matter of *equity* the carrier should refund to Cargo a *ratable proportion* of the carrier's recovery, as to items which had been collected from Cargo.

That method of accounting (adjustment), between the *two* parties to the contract, is acceptable to the Petitioner in the present case. *Post*, p. 52.

2. *Erie & Western Transp. Co.* v. *The City of Chicago, et al.* (C. C. A.), 178 Fed. 42.—A steamer, *Conestoga*, laden with cargo, collided with a water-works crib built by the city of Chicago in navigable waters, due to the failure of the city to provide means of signalling (by bell) to warn moving vessels of the presence of the crib. The shipowner had not committed any negligence, so that a general average, which arose by reason of the collision, was lawfully stated and adjusted. The circumstances there gave the right (and obligation) of contribution under the American law of General Average. The nature of the right which had been invaded was thus one "created by law". However, that right was not asserted by Cargo, but by the Shipowner. The case does not present the matter in controversy in the present case.

3. *Gray's Harbor Tugboat Co.* v. *Petersen*, (C. C. A.) 250 Fed. 956.—That case also involved a collision, in which the carrier was *not* negligent. The contributions in General Average were compulsory, under the American law of General Average, and were *not* payable because of a special contract (the Jason Clause). But, it is to be remarked that the recovery of the general average expenditures was made by (allowed to) the shipowner, and not to contributing cargo owners. The items entering into the general average expenses were items of "collision damage", which the Shipowner had the primary right to assert and recover. Nevertheless, that case also did not involve the questions raised here.

By resorting to the foregoing American cases as authority for the proposition which the Circuit Court of Appeals has announced these cases stand for, it is respectfully submitted that the Court has thereby disclosed a misconception of the real issues in the present case.

(i) *The English Law Is Not Applicable.*

It is said by the Circuit Court of Appeals that: "The same rule obtains in England"; and the case of *The Minnetonka* (1905), Prob. Div. 206, is cited as authority for the statement. (R. 53).

The substantial difference between English law and American law with respect to contracts against negligence is reflected in the comparative viewpoints of the respective Courts in dealing with the law of General Average. Under English law, a general exception of negligence in the contract of carriage is regarded as wholly extinguishing negligence, and general average contributions are then deemed to be obligatory, by force of the maritime law of General Average, as if there had not been any negligence. That seems to be the purport of the decision in *The Carron Park,* 15 Prob. Div. 203. Cf. *The Ettrick,* L. R. 6 Prob. Div. 127 (Appendix III). Under the American law, the restricted exception (such as a Jason Clause) does not extinguish the negligence, *i. e.,* does not alter the law of General Average, but permits of adjustment (contributions) between the parties concerned. *The Irrawaddy,* and *The Jason, supra.*

The English and American laws relating to adjustment of collision damages also differ substantially. In a "both to blame" case, the damages are divided in a ratio of the comparative negligence under the English law, and the owner of cargo damaged on one vessel may recover from

the other vessel only such part as is equivalent to the degree of fault of the other (non-carrying) vessel. *The Umona,* 1914 P. 141; *The Measure of the Damages in Maritime Collisions,* 3rd Edition, by E. S. Roscoe, pages 20-22, and cases there cited. Under American law, the damages are divided equally (each bears one-half), but the cargo owner on the carrying vessel may recover his total *physical* damage from the non-carrying vessel (and none directly from the carrier, because of the Harter Act); *The Chattahoochee,* 173 U. S. 540.

English and American decisions can hardly be paralleled on the questions involved here. *The Irrawaddy, supra,* pages 194-195.

But, it is not believed that the case of *The Minnetonka, supra,* goes so far as to lay down a rule of law such as the Circuit Court of Appeals in the present case has applied. The Court of Appeal in that case allowed the Admiralty as owner of cargo on the *Uskmoor* to recover from the tortious non-carrier, *Minnetonka,* certain "damages" in the nature of substituted expenses, after abandonment of the voyage on which the *Uskmoor* was bound, the voyage having been abandoned because it was deemed that there would be a saving of expenses as compared to repairing the *Uskmoor* and continuing the voyage. The Admiralty had paid a "lump sum" to the *Uskmoor* to compensate the latter for her loss of freight. In the adjustment between the two vessels, the *Minnetonka* and the *Uskmoor,* that payment had not been considered (accounted for), and the Court held that a moiety of the amount should be made good to the Admiralty. It is apparent from a reading of the decision that the Court was more concerned as to whether or not the arrangement between the Admiralty and the *Uskmoor*

was "a reasonable compromise"; and, the Court apparently did not consider the claim as in the nature of one in General Average to be recoverable as such from the *Minnetonka.*

Incidentally, the case of *The Minnetonka* was cited by the late Circuit Judge MAYER, then sitting as a District Judge, in the case of *Ralli* v. *Societa Anonima, supra,* 222 Fed. 994; and Judge MAYER there stated, at page 999:

> "*But under English law such contributions are not regarded as part of the damage to be recovered from the wrongdoer.* This was held by JEUNE, J., in *The Marpessa* [1891], Prob. Div. 403, and I see nothing in *The Minnetonka* [1905], Prob. Div. 206, to the contrary." (Italics ours.)

It is true that in its decision in *The Minnetonka* the Court there apparently did not take the view expressed by the Court, in the case of *The Marpessa,* cited by Judge MAYER, as above. In that case, *i. e., The Marpessa,* the Court disallowed the shipowner's claim for recovery of his general average contribution towards making good a loss of cargo jettisoned from the *Marpessa,* although the latter was not at fault, the non-carrying vessel being solely liable. The claim had been put forward by the owner of the *Marpessa;* and the Court stated, at pages 408-409:

> "* * * The loss sustained by the ship, by having to make the general average contribution in question, was not caused by the collision, though, of course, it would not have occurred had not the collision happened. * * * it seems to me clear that it is the relation between ship and cargo out of which the obligation to make general average contribution arises, and not the antecedent collision that is the immediate cause of the loss to either ship or cargo by reason of the necessity of making such contribution. It is

an instance of the old distinction between *causa causans* and *causa sine qua non.*''

If the case of *The Minnetonka* stands for the rule applied by the Circuit Court of Appeals here, which is not conceded, it is suggested that the viewpoint expressed in *The Marpessa* would be preferable to the doctrine which it is now claimed is supported by the decision in *The Minnetonka.*

But, if the decision in *The Minnetonka* (1905) is to be so regarded, it is contrary to the rule as announced by the English Court of Appeal seventeen (17) years later in the case of *Elliott Steam Tug Co., Ltd.* vs. *The Shipping Controller* (1922), 1 K. B. 127, cited by this Court in its decision in *Robins* vs. *Flint.*

(j) *Conclusion.*

The foregoing considerations lead to the conclusion that the obligation under which Respondents (Cargo) contributed toward the port of refuge expenses, being wholly contractual, and the ''damage'' being the result only of the contractual relationship between the Respondents and the Petitioner, there cannot be any recovery from the non-carrying vessel, *Sucarseco,* in tort, since there was not any contractual privity between the Respondents and the owner of the *Sucarseco.*

THIRD POINT.

THE RESPONDENTS' CLAIM FOR REFUND OF THEIR GENERAL AVERAGE CONTRIBUTIONS IS DERIVATIVE ONLY, AND NOT DIRECTLY RECOVERABLE FROM THE *Sucarseco*; AND, THEY ARE ENTITLED TO RECOVER BACK FROM THE PETITIONER ONLY A PROPORTIONATE SHARE OF THE PETITIONER'S RECOVERY FROM THE *Sucarseco* OF THE ITEMS TO WHICH THEY CONTRIBUTED.

(a) *Respondents Are Entitled Only to an Accounting from Their Carrier.*

It is conceded that Respondents (cargo owners) should be entitled to have an "accounting" from the Petitioner, in respect of contributions made toward the expenses of a general average nature. That is simply a matter of equity and justice. *Ralli* v. *Societa, supra,* 222 Fed. 994. But, this Petitioner's contention is that the Respondents are not entitled to a *full* recovery of all contributions, since the Petitioner (carrier) has not made full recovery of the items of expense as "collision damage." The Respondents are limited to their *ratable proportion* of the Petitioner's recovery.

(b) *The Expenses in Dispute Are Primarily Recoverable by the Petitioner from the Sucarseco.*

The expenditures made by the Petitioner at the repair port ("port of refuge"), are properly recoverable as items of the "collision damages," as between the two colliding vessels. The major items (discharging, storing, and reloading cargo) were directly consequential to the repair work on the vessel. *Appendix I.* Under the principle of

restitutio in integrum, these expenses incurred and paid by the Petitioner, are recoverable by the Petitioner direct from the joint tort feasor, *Sucarseco,* the owners of which are *primarily* liable to the Petitioner. *The Baltimore,* 8 Wall. [75 U. S.] 377, page 385; *Williamson* vs. *Barrett,* 13 How. [54 U. S.] 101 (411), page 110 (416); *The Conqueror,* 166 U. S. 110, page 125; *The Margaret J. Sanford* (C. C., S. D. N. Y.), 37 Fed. 148, cases cited at page 152.

That a part of these several items constituted expenses of a "general average nature" was so, because of the contract between the Petitioner and the Respondents.

(c) *The Relationship is Analogous to that Arising from Insurance.*

Such rights as the Respondents may have are *derivative* from the *primary* right of the Petitioner. That limitation results from the *nature* of the relationship.

The analogy of a General Average situation to one of Marine Insurance has heretofore been applied by the Courts in considering Cargo's position *vis-a-vis* the carrier. *Pool Shipping Co., Ltd.* vs. *United States,* 33 Fed. (2d) 275; *Ralli* vs. *Societa,* 222 Fed. 994.

Authorities on the law of General Average emphasize the insurance relationship, and the analogy.

The early origin and history of "General Average" are traced by the authors of Lowndes' General Average, 6th Edition, "Introduction." It is older than the "custom" founding Marine Insurance, and laws and practices pertaining thereto; but the underlying cause of its origin and growth was the need of insuring or indemnifying the several partners in a marine venture against losses or expenses incurred for the common benefit, i.e., sharing such

losses and spreading them out *pro rata;* so General Average is in reality a method of *mutual protective insurance.*

Mr. Sanford D. Cole, in his book entitled "General Average Law and Rules," 1928, at pages 2-3, states:

> "General average is a method of distributing among a number of people the burden of a loss which would otherwise have fallen on one person. General average is therefore a method of arriving at the same result which might be reached by the alternative plan of insurance, but it is older in origin than marine insurance."

Under the insurance analogy, the doctrine of *subrogation* applies, and cargo has only a *subrogee's* right (as insurer of the proportion of the general average): *"In any form of remedy the insurer can take nothing by subrogation but the rights of the assured"; Phoenix Ins. Co.* v. *Erie Transp. Co.,* 117 U. S. 312, page 321. If the Petitioner recovers only a moiety of its damages, then Cargo may recover no more than that portion.

(d) *The Courts Have Heretofore Recognized and Applied the Insurance Analogy.*

The opinion of this Court in the case of *Pool Shipping Co., Ltd.* vs. *United States,* 33 Fed. (2d) 275, recognized the analogy of the general average relationship to that of insurance. In the *Pool* case, however, the non-carrying colliding vessel, *Apache,* was held solely at fault, and it did not become necessary to consider what proportion of the total recovery made by the *Clearpool* (innocent Carrier) should be allocated to cargo, in adjustment between the two

parties (*Clearpool* and Cargo). That is the question at issue in the present case [as between *Toluma* and Cargo].

The question decided in the *Pool* case was whether or not the *Clearpool,* having received certain contributions in general average from her cargo, should be allowed [also] to recover from the United States (*Apache*) these amounts as a part of the collision damage; and this Court held that the *Clearpool* could so recover, and would not have to deduct from its recovery the contributions thus received.

In its discussion of the analogy of the doctrine of subrogation (law of insurance) to a right of collection of general average expenses as a collision damage, the Court stated, at page 277:

> "While there seems to be no precise authority applicable to the present case, the *insurance decisions* show the correct principle involved. It has long been settled that payment of insurance affords no defense to the wrongdoer in an action for collision damages. *The Propeller Monticello* v. *Mollison,* 17 How. 152, 15 L. Ed. 68; *The Potomac,* 105 U. S. 630, 26 L. Ed. 1194. The cause of action survives and the insurer is subrogated. The obligation of the cargo to contribute to the sacrifice made in the common interest amounted to an involuntary insurance for the benefit of the hull. The *Apache* was primarily liable and the indemnifying cargo to the extent of its contributive obligation was secondarily liable. The latter was, therefore, in the position of a surety and entitled to subrogation." * * *
> "In either event the cause of action to recover it as part of the collision damages would remain intact, and the satisfaction of the decree for this item would give the respondent a good discharge. *The recovery*

> *to the extent of any amount theretofore contributed by cargo would be for its account.''* (Italics ours.)

The opinion in that case was written (delivered) by Circuit Judge Augustus Hand, who did not sit in the present case. The opinion of the Court in the present case characterized the result in *The Pool Company* case as [only] establishing "the right of the carrying ship to recover as bailee of the cargo" (R. 55); but, it was nevertheless recognized in *The Pool Company* case that the right of the carrier (Petitioner here) was *primary*, and that Cargo's right was only *derivative.*

Also, in the case of *Ralli* vs. *Societa, supra,* 222 Fed. 994, discussed in the previous text, *ante,* page 45, a similar analogy was invoked in determining cargo's "refund" from its own carrier, of portions of collision damage recovered by the carrier direct from the non-carrying vessel.

The Court stated, at page 999:

> "The *Groningen* and the *Aristea* having paid each to the other one-half of the other's damage (by settlement of account), and the *Aristea* having thus received back from the *Groningen part of the loss* for which the cargo owners had contributed to some extent, the cargo owners now ask that the *Aristea* return to them *their just proportion.''* (Italics ours.)

Also, at pages 999-1000:

> "The suggestion is offered that an analogous principle may be found in the obligation of indemnity arising in cases of marine insurance, where subrogation gives the indemnifying insurer the right to all damages recovered from the wrongdoer; the theory being that subrogation is an equitable ar-

rangement incident to all contracts of indemnity and to all payments on account thereof. *Castellane* v. *Preston,* 11 Q. B. D. 380, 388; *Phoenix Ins. Co.* v. *Erie & Western Transp. Co.,* 117 U. S. 312, 321, 6 Sup. Ct. 750, 29 L. Ed. 873."

The Court, proceeding on that theory, allowed a recovery to Cargo (as an accounting from its carrier, the *Aristea*), of *its proportion of the one-half recovery* which had been allowed the owner of the *Aristea* as a collision damage against the *Groningen.*

The case of *The Andree-The Alexander* (C. C. A., 2nd Cir.), 47 Fed. (2d) 874, page 875, is another instance where cargo (on the innocent vessel there) was limited to recovering the same proportionate part of its general average contributions as had been recovered by its carrying vessel as collision damage (*i. e.,* 90%).

The cases cited in the opinion of the Circuit Court of Appeals here, *ante,* pages 45-48, are not contrary to the above contention, nor are other cases cited below on behalf of the Respondents, such as *The Gulf of Mexico,* 1924 A. M. C. 932; and *The Lewis H. Coward,* 34 Fed. (2d) 791. These cases do not bear on the question presented in the present case; but, if they have any bearing, they support, rather than contradict, the contentions made here.

(*e*) *Conclusion.*

In the light of *The Jason, supra,* it is now possible for a shipowner, and cargo, [and other parties] to a maritime adventure to make practically any contract that they please respecting what items shall constitute general average, how they shall be paid, by whom, and under what circumstances. The liability may fluctuate from zero to thousands of dol-

lars, depending on the private agreement between the shipowner and the cargo owner.

If, therefore, the decision of the Court below is correct, the rights of cargo against non-carrying tort feasors will arise in as wide variety as may be the terms of the contract between the cargo and its carrying vessel. Obviously, this leads to an incongruous and indeterminable situation.

It would seem to be clear that the liabilities of a tortious colliding vessel should arise only in favor of the party directly injured, be limited to the usual damages for torts, and should not fluctuate with the terms of contracts between the vessel with which it collides and that vessel's cargo, to which contract it is not a party.

If by reason of the special contract between the carrying vessel and its cargo, the cargo by contract pays to the carrying vessel certain portions of the damages sustained by the carrying vessel, it is only right and equitable that the cargo paying such items by contract should be reimbursed by the carrying vessel to the extent (only) of a *ratable* share of the recovery made from the non-carrying vessel for these items. But it is wholly contrary to all principles of the law of torts that payment resulting from a purely contractual obligation should furnish a direct cause of action against a tort feasor who was not party to the contract.

LAST POINT.

THE DECISION OF THE CIRCUIT COURT OF APPEALS SHOULD BE MODIFIED: SO THAT, THE RESPONDENTS SHOULD NOT BE ALLOWED ANY RECOVERY OF THEIR CONTRIBUTIONS IN GENERAL AVERAGE DIRECT FROM THE *Sucarseco;* BUT, THE DAMAGES ARISING FROM THE COLLISION SHOULD BE ADJUSTED PRIMARILY BETWEEN THE TWO TORTIOUS COLLIDING VESSELS, THE *Toluma* AND THE *Sucarseco;* AND, THE RESPONDENTS SHOULD THEN BE ALLOWED TO RECOVER BACK FROM THE PETITIONER ONLY SUCH PROPORTIONAL PART OF THE RESPONDENTS' CONTRIBUTIONS TOWARDS ITEMS IN GENERAL AVERAGE AS THE PETITIONER IS ALLOWED TO RECOVER FROM THE *Sucarseco.*

Respectfully submitted,

WILLIAM H. MCGRANN,
CLETUS KEATING,
ROGER B. SIDDALL,
Of Counsel.

New York, N. Y., December 29, 1934.

APPENDIX I.

EXTRACTS FROM "GENERAL AVERAGE STATEMENT" (R. 30).

Report of American Underwriters Surveyor:

Survey was made of the vessel November 23rd, 1928 while lying at anchor off Sewalls Point, loaded with approx. 76500 cases of Gasoline, Naphtha and Kerosene, and 2261 tons General Cargo.

Bow plating, stem, and internal work in way of peak damaged, leaking slightly in way of stem but no apparent leakage in cargo holds.

After survey it was recommended that all kerosene, gasoline and naphtha be removed from No. 1 hold, also part general cargo in forward end of No. 1, and that temporary repairs be effected to allow the vessel to proceed on her voyage. This proposal however did not meet with the approval of the Newport News Shipbuilding & Dry Dock Co., they requiring that all cased gasoline, naphtha and kerosene be removed from the vessel prior to starting any hot work on the vessel, after which it was recommended that the vessel be discharged as necessary and placed on drydock for permanent repairs.

December 2, 1928. Vessel drydocked at Newport Shipbuilding & Dry Dock Co., loaded with approx. 1260 tons cargo.

Report of Foreign Underwriters Surveyor:

At a survey held on the 25th November, in company with the Owners Superintendent, it was found that the collision bulkhead was badly bulged and that the damage extended into the No. 1 hold on the port side, and it was recommended that sufficient cargo be discharged from this hold to make a further and more complete examination of the damage.

As a result of this survey held in company with the Owners Supt. and the surveyor to the U. S. Salvage Association, it was recommended that, temporary repairs be abandoned and permanent repairs be effected.

The whole of the Kerosene, Naphtha and Gasoline in the No. 1 Hold be discharged: the No. 4 Hold be also discharged for the purpose of drydocking the vessel.

At this time, the Newport S. B. & D. D. Co. were approached with a view to drydocking the vessel for repairs, and this Company declined to consider repairing the vessel without discharging the whole of the Kerosene, Naphtha and Gasoline on board the vessel.

APPENDIX II.

HARTER ACT.

An act relating to navigation of vessels, bills of lading, and to certain obligations, duties, and rights in connection with the carriage of property.

Be it enacted by the senate and house of representatives of the United States of America in congress assembled, that it shall not be lawful for the manager, agent, master or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words and clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect.

Sec. 2. That it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligation of the owner or owners of said vessel to exercise due diligence, properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver the same, shall in any wise be lessened, weakened or avoided.

Sec. 3. That if the owner of any vessel transporting merchandise or property to or from any port in the United

States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped and supplied, neither the vessel, her owner or owners, agent or charterers, shall become or be held responsible for damages or loss resulting from faults or errors in navigation or in the management of said vessel, nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service.

[Secs. 4, 5, 6 and 7 omitted as not material here.]

Sec. 8. This act shall take effect from and after the first day of July, eighteen hundred and ninety-three. Approved February 13, 1893. [U. S. C. A., Title 46, Sections 190-195; 27 Stat. 445.]

APPENDIX III.

Comparative National Laws of General Average.

Argentine—

> Art. 1318. Expenses occasioned by inherent defects of the ship, by her unseaworthiness, *or by some fault or negligence of the captain or of any of the crew, are not counted as general average,* even though voluntarily incurred after due council held, for the good of ship and cargo.
>
> All these expenses are to be borne exclusively by the captain or ship.
>
> (Code of Argentine Republic, Art. 1318; Lowndes, 6th Ed., p. 435.)

Brazil—

> Art. 765. *Expenses occasioned by* the inherent defect of the ship, or by *the fault or neglect of the captain or crew shall not be deemed general average,* although incurred voluntarily and after deliberation for the good of the ship and cargo. All the expenses must be borne by the captain or ship. (Art. 565.)
>
> (Brazilian Commercial Code of 1850, Title 13, Chapter 1, Article 765; Lowndes, 6th Ed., p. 488.)

England—

Under the common law, and the maritime law of General Average, as applied by the English Courts, negligence of the shipowner inducing the general average sacrifice or expense precludes the shipowner from collecting contributions in general average from the other (innocent) parties in the venture. Lowndes' General Average, Sixth Edition, page 37. It is there stated:

> "The broad principle may be laid down, then, that no one can make a claim for general average contribution, if the danger, to avert which the sacrifice was made, has arisen from the fault of the claimant or of some one for whose acts the claimant has made himself, or is made by law, responsible towards the co-contributors."

The early case of *Strang* vs. *Scott* (1889), 14 App. Cas. 601, is cited, and the words of Lord Watson, delivering the judgment of the Privy Council, are quoted, in the footnote, at page 38:

> "When a person who would otherwise have been entitled to claim contribution has, by his own fault, occasioned the peril which mediately give rise to the claim, it would be manifestly unjust to permit him to recover from those whose goods are saved, although they may be said, in a certain sense, to have benefited by the sacrifice of his property."

Also, *The Ettrick* (Court of Appeal), L. R. 6 Prob. Div. 127.

The general rule may be modified by contract between the parties concerned. *The Carron Park,* 15 P. D. 203. It appears that a general exception of negligence will suffice to remove the disability of the shipowner to collect; but, such general exceptions are not deemed to be in contravention of "public policy", under the English law. As was stated in the case of *The Irrawaddy,* 171 U. S. at page 195:

> "By the English law parties are left free to contract with each other, and each party can define his rights and limit his liability as he may think fit."

(Under the American law, the exception must be specifically expressed, hence the "Jason Clause". *The Jason,* 225 U. S. 32.)

The distinction between English and American law with respect to contracts against negligence was remarked in the case of *Tempus Shipping Co., Ltd.* vs. *Louis Dreyfus & Co.* (House of Lords), 40 Lloyd's List R. 217, p. 227, citing the case of *The Irrawaddy, supra.*

ITALY—

643 (R. 655). General average are the extraordinary expenses incurred, and the damages voluntarily sustained for the good and for the common safety of ship and cargo. • • •

19. • • •

Not considered general average, though incurred voluntarily for the common good and safety, are damage suffered or expenses incurred by the ship, *when they were occasioned* by the defect or old age of the ship, or *by the fault or neglect of the captain or crew.* (Italian Codice di Commercio, Title VII, Ch. 1, Art. 643. Lowndes, 6th Ed., 609, 614.)

HOLLAND—

§700. *When* the inherent defect of the ship, her unfitness to perform the voyage (k), or *the fault or neglect of the captain (1) or crew, has occasioned the damage or expense, such damage or expense,* although incurred purposely, after due deliberation, and for the common benefit of ship and cargo, *is not general average (m).* (Code, Book II, Ch. XI, §700; Lowndes, 6th Ed., 586-588.)

GERMANY—

§700. All damage intentionally done to ship or cargo, or both, by the master or by his orders, for the purpose of rescuing both from a common danger, together with any further damage caused by such meas-

ures, and also expenses incurred for the same purpose, are general average.

* * * * * *

§702. The application of the rules for general average is not debarred by the fact that the danger has been occasioned by the fault of a third party, or even of one of the parties interested in the adventure.

The party interested who is in fault is, however, *not only precluded from claiming compensation for any loss he may himself have sustained, but is likewise answerable to each contributor for the loss which the latter may suffer by reason of the damage being apportioned as general average.*

If the danger has arisen through the fault of one of the crew, the shipowner also is, subject to the conditions of §§485, 486(c), answerable for the consequences. (Commercial Code, Fourth Book, Seventh Section, Title 1, §§700 and 702; Lowndes, 6th Ed., 531, 532.)

SWEDEN—

§187(a). All damage intentionally done to ship or cargo in order to save ship and cargo from any danger threatening (b) both, as well as every other sacrifice made for such purpose and all damage and loss occasioned thereby (c), shall be treated as general average.

General average shall be paid by ship, cargo and freight in the proportion of their respective values, calculated in the manner mentioned in §§207-211(d).

* * * * * *

§191. The apportionment of damage resulting from general average is not precluded by the fact that the danger which occasioned the average was caused by the default of some person. *No compensation in the general average shall, however, benefit such person in default. If the danger was caused by any fault or*

neglect, for which the owner of the ship is answerable in accordance with §8(m), he shall not be entitled to compensation in general average.

In case of error of judgment on the part of the master, or the person acting on his behalf, with regard to the nature of the danger or the measures taken to avoid it, the damage should nevertheless be apportioned as in general average; the owner of the ship, however, forfeits his right to compensation, unless the measure may be excused by the exceptional nature of the circumstances under which it was adopted. Any person thus forfeiting the right to compensation, or being compelled to contribute to the average, shall have the right to recover his loss from the person legally responsible for the damage. (The Maritime Law of the 12th June, 1891, Ch. VII, §187, §191; Lowndes, 6th Ed., 705, 712.)

FRANCE—

§400. To general average belong * * *

And, in general, damage voluntarily sustained and expenses incurred after express deliberation, for the common good and safety of the ship and cargo, from their loading and departure to their arrival and discharge (h).

* * * * * *

§405. *Damage done* to the merchandise *in consequence* of the master having neglected to close the hatches, to make the ship properly fast, or to provide proper implements for hoisting, and *of all other misfortunes caused by carelessness of the master or crew, is particular average,* for which the shipper has his recourse against the master, the ship, and the freight (q).

(q) It has been decided that this provision extends to all damage and expenditures, even though done or incurred for the common safety of ship and cargo, when

due to the default of the captain (Cour de Cassation, 16th Nov. 1881, and 6th June, 1882), unless by a special clause in the charter-party or bill of lading the shipowner is exempted from liability for such default. (Cour de Cassation, 12th June, 1894; 18th Jan., 1909.) (The Law of France. Lowndes, 6th Ed., 508, 510, 513.)

NORWAY AND DENMARK—

In substance and in arrangement, the Danish and Norwegian Laws are the same as the Swedish Law. (Lowndes, 6th Ed., p. 648, 504.)

RUSSIA—

§1087. If the captain has overcharged his vessel beyond the load-water-line, and if, in case of danger, to save or lighten the vessel, he throws overboard a portion or the whole of the merchandise, the goods thus thrown overboard are not considered as averages, but the captain and shipowner should pay the entire loss. (Lowndes, 6th Ed., 671.)

PORTUGAL—

TIT. V:

Art. 635. §1. All extraordinary expenses incurred and sacrifices made voluntarily by the captain or in pursuance of his orders, with the object of avoiding a danger, for the common safety of ship and cargo, from loading and departure to return and discharge, are general or common average.

TIT. VI.

Art. 654. Justifiable grounds for putting into a port of refuge are:

* * *

* * *

3. Any accident which has disabled the ship from continuing the navigation.

• • •

Art. 658. Putting into a port of refuge is considered not to be legitimate:

• • •

• • •

3. If the accident which has made the ship unfit to continue the voyage is due to inadequacy of repairs, fitting-out or equipment, or to bad stowage, or, when it results from a wrong course of action or a want of prudence on the part of the captain.

• • • • • •

TITLE VI. Art. 660. The discharge of cargo at a port of refuge can only be authorized when it is indispensable for the repair of the ship, or on account of damage to the cargo. In these cases there should first be obtained, in the kingdom and its possessions, an authorization by a competent judge, and abroad an authorization by the consular agent, if there be one, and if not by the local authority. (Portuguese Commercial Code. Lowndes, 6th Ed., 652, 660, 661.)

SPAIN—

§811. Gross or general average consists as a general rule of all losses and expenses which are purposely incurred to save ship, her cargo, or both together, from an expected and real danger; and, in particular, of the following:

• • • • • •

§809. Simple or particular average consists generally, of all expenses and damage caused to ship or cargo, which have not been intended for the common benefit or use of all the parties interested in ship and cargo; and especially of the following:

• • • • • •

§810. The owner of the thing that has caused the expense or sustained the damage must bear particular average.

§813. Before incurring the expenses, or causing the damage connected with the general average, the captain's decision must be made after consultation with the mate and other officers of the ship, in the presence of any parties interested in the cargo who may happen to be on board.

If these should not agree to the measures, and the captain and officers, or the majority, or the captain, apart from the majority, should deem them necessary, they may be carried out on his responsibility, without prejudice to the right of the shippers to claim against the captain before the judge or proper court, if they can prove that he has acted with malice, unskilfulness, or carelessness. * * *

* * * * * *

§820. Putting in is not considered legitimate in the following cases:—

* * * * * *

4. If in the act causing the average there was any malice, negligence, thoughtlessness, or unskilfulness on the captain's part.

§821. The expenses of the putting into a port of refuge are always to the shipowner's or lessor's account; but he is not responsible for any detriment which may happen to the shippers in consequence of the putting in, provided that this was legitimate (k).

If otherwise, the shipowner and the captain are jointly responsible. (Codigo de Comercio of 1885; Lowndes, 6th Ed., pages 674, 677, 680, 683.)

JAPAN—

Art. 641. General average includes all damage and expense arising from any disposition made by the master in regard to the ship or cargo to save both from a common danger.

This provision does not affect a recourse by a party interested against any person from whose fault the danger arose. (Japanese Commercial Code, Art. 641; Lowndes, 6th Ed., 627.)

BELGIUM—

TITLE III, CHAPTER III: Art. 145 (100). In default of special agreements between all the parties, averages are regulated in conformity with the following provisions.

* * * * * *

Art. 147 (102). Extraordinary expenses incurred, and damage sustained voluntarily for the common good and safety of the ship and cargo, are general average.

All other averages are particular.

Art. 148 (103). The expenses of any port of refuge made in consequence of sea peril which, if the voyage had been continued, would have involved the ship and cargo in a state of common peril, are always considered general average. The wages and provisions of the crew, from the entry into the port of refuge until the ship has been placed in a condition to continue the voyage, are comprised in these expenses. If the reason of putting in is damage known to arise from the *vice propre* of the ship, or from a cause chargeable to the master or the crew, the expenses are particular average on the ship. But if required because of spontaneous fermentation or other *vice proper* of the goods, all the expenses are particular average on the cargo. (Lowndes, 6th Ed., p. 472.)

Appendix IV.

Part of Items of Disbursements from General Average Statement, Included in Par. 4 (a), Stipulation, R. 29.

Item	*Page*	*Subject*	*Amount*
53	90	Insurance premium on "legal liability" on cargo to destination	$ 375.00
54	92	Insurance premium on General Average charges on cargo to destination	250.00
73	112	Legal expenses in connection with embargo on cargo at destination	50.00
74	112	Legal expenses in connection with embargo on cargo at destination	18.80
75	112	Cables re preceding	31.02
76	112	Advertising re preceding	35.00
77	113	Advertising re preceding	10.00
78	113	Expenses of signing bonds on cargo	50.00
79	113	Postage (re above)	3.67
80	113	Agency fee concerning General Average security at destination	454.54
83	116	Agency fee concerning General Average security at destination	225.00
85	118	Commission on General Average disbursements	707.82
87	134	Interest on General Average disbursements	1,809.92
90	138	Drawing Average Agreement	25.00
91	138	Drawing affidavit of Master	15.00
92	138	Valuation of Toluma for G. Av	50.00
93	140	Lithographing Statement	326.00
94	140	Services of General Average Adjusters	4,000.00
95	142	Commissions for collecting and settling G. Av.	1,099.02
		TOTAL	$9,535.79

Dated: February 6, 1935.

FILE COPY

Supreme Court of the United States

NO. 524—OCTOBER TERM, 1934.

AKTIESELSKABET "CUZCO" as owner of the Norwegian Steamship "TOLUMA",

Petitioner,

—against—

Steamship "SUCARSECO", her engines, boilers, etc., SUBMARINE BOAT CORPORATION,

Respondent,

(and two other cases).

WEST INDIA OIL COMPANY and J. H. SENIOR, AGENT, AMERICAN INSURANCE COMPANY *et al.*,

Respondents.

(Consolidated Cases.)

BRIEF IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI.

D. ROGER ENGLAR,
LEONARD J. MATTESON,
Counsel for Respondents,
West India Oil Company, and J. H. Senior, Agent, American Insurance Company et al.

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Supreme Court of the United States

No. 524—October Term, 1934.

Aktieselskabet "Cuzco", as owner of the Norwegian Steamship "Toluma",

Petitioner,

—against—

Steamship "Sucarseco", her engines, boilers, etc., Submarine Boat Corporation,

Respondent,

(and two other cases).

West India Oil Company and J. H. Senior, Agent, American Insurance Company *et al.*,

Respondents.

(Consolidated Cause.)

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

Statement.

This case presents a very simple issue which may be stated as follows:

> **Where cargo becomes liable to contribute in general average to losses and expenses incurred to minimize the damages resulting from a marine disaster, may the cargo owner recover the amount of this contribution as part of his damages, from one whose fault caused or contributed to the disaster?**

POINT I.

The law has been settled in accordance with the decision of the Circuit Court of Appeals both in this country and in England for many years.

In 1893 this question was considered and answered in the affirmative by Judge Addison Brown in one of those careful and scholarly opinions by which he contributed so much to the development of our admiralty law. *The Energia*, 61 Fed. 222. On appeal his decision was affirmed by the Circuit Court of Appeals for the Second Circuit, which quoted at length from his opinion, 66 Fed. 604.

The authority of the decision in *The Energia* has never been challenged. On the contrary, the case has been repeatedly cited both in this circuit and in other circuits; and the English courts have independently arrived at the same conclusion. *The Minnetonka* (1905), Prob. Div. 206. (See C. C. A. opinion below, R., p. 83.)

The petitioner, while apparently accepting the *Energia* decision, seeks to distinguish the present case on the ground that no general average would have been payable here if the relation of the parties under the general maritime law had not been modified by the contract of affreightment. This distinction fails because the same thing was true in the case of the *Energia*. In that case the general average was governed by British law, which obtained at the port of destination; but even under British law a vessel which is legally responsible for the disaster cannot recover a general average contribution from cargo. The contribution was due under British law only because the bill of lading contained a clause (valid under that law) exempting the carrier from liability for the negligence of his servants. *The Carron Park* (1890), Prob. Div. 203. Hence, it was no more true in the case of the *Energia* than in the present case, that the liability for general average arose under the

general maritime law, apart from the contract of transportation. Indeed, it is impossible to discuss general average apart from contract; for there is always a contract of transportation, express or implied.

POINT II.

Respondent's damages (to "Toluma" cargo) arise from the collision and not from the contract of affreightment. The Jason Clause merely provides a method for apportioning reasonably between the vessel ("Toluma") and her cargo, the expenses necessarily incurred to avert or minimize the peril to which both cargo and vessel were exposed by the collision.

Petitioner urges that the damage sustained by the cargo owners arose from a contract between them and the "Toluma"; and, hence, as to a third party, the "Sucarseco", these damages are remote and not legally recoverable. It is worthy of note that this argument is not made by the third party ("Sucarseco"), but by the "Toluma", which was a party to the contract, and which now seeks to shield itself behind an objection of remoteness which, if it existed, would more properly be raised by the "Sucarseco". This anomaly, however, is relatively unimportant. A complete answer to the petitioner's argument is found in the fact that the loss sustained by the cargo owners was not caused by their contract with the "Toluma", but by the collision between that vessel and the "Sucarseco". It is stipulated and agreed that all of the expenses involved in this litigation were caused by the collision (R. 47) and were general average expenses (R. 50-51); *i. e.*, expenses incurred to save both the "Toluma" and her cargo from greater loss resulting from the collision. The Jason Clause in the "Toluma" bill of lading did nothing more than authorize the master to act promptly and effectively, on be-

half of cargo as well as hull, in the event of disaster, *i. e.*, it was an agreement by cargo to bear its share of expenses and losses incurred by the master for the purpose of minimizing the damages. Cargo's general average contributions were, of course, merely its share of such losses and expenses.

If the cargo owners themselves had been present and had incurred necessary expenses for the preservation of their cargo, their right to recover such expenses could scarcely be disputed. The same would be true if the master, after disaster, had communicated with them and asked their authority to incur necessary expenses on their behalf to save the cargo. By the Jason Clause, in order to avoid delay (which in a case of marine disaster may often be fatal) the cargo owners authorize the master, in advance, to incur necessary expenses for their account when their property is in danger, without regard to any previous negligence on the part of the ship. Why the giving of such authority in advance should alter the legal situation as against a third party, is difficult to understand. The petitioner apparently would not dispute the cargo owner's right to recover salvage which he was forced to pay to an independent salvor who intervened and acquired a lien on the cargo, for services rendered in saving it from peril after the collision. It claims, however, that because the cargo owner authorized the master of the vessel (obviously the person best situated to act for all interests) in advance to incur expense for cargo's account,—the expense so incurred is not recoverable. This argument is wholly unsupported either by logic or by legal authority.

The petitioner cites *Flint* v. *Robins*, 275 U. S. 303, and similar cases, as authority for the proposition that the owners of cargo on the "Toluma" can have no claim against the "Sucarseco". These cases have no bearing whatever on the present case. The claim of the cargo owners is not

based on a tort committed against the "Toluma", but on a tort committed against their own property. The collision endangered not only the "Toluma" but also her cargo; and the expenses in question (*ex hypothesi,* since it is admitted that they were properly allowable in general average) were necessary to save both vessel and cargo from greater loss. The present is a case, therefore, where the cargo owners sued to recover expenses which they had necessarily and properly incurred to save their own property from a peril to which it was physically exposed by the tortious act of a third party. If the petitioner's argument were accepted with respect to such expenses, it might be argued with equal force that the petitioner could not recover any part of the "Toluma" hull damage from the "Sucarseco", because the loss arose not from the collision, but from the contract which the petitioner made with the shipyard to repair the damage.

Petitioner argues that the cargo owners need not have accepted a bill of lading containing the Jason Clause; and in that event they need not have paid the expenses in question, and that the shipowner was legally obligated in any event to incur the general average expenses in order to deliver the cargo, or respond in damages* (Petitioner's Brief, Point I, p. 12). As we shall point out, *this contention is directly contrary to the ruling of this Court in the Jason,* 225 U. S. 32, 54.

Possibly, in the absence of a Jason Clause, the cargo owners would not have been bound to contribute to expenses incurred by the master even though such expenses were of a general average nature; but neither would the master have been bound to incur them. If he had not done so (it being agreed that the expenses were properly and

* In the event of a marine peril preventing the completion of the voyage, the shipowner is protected from liability by the provisions of the Harter Act. U. S. Code, Title 46, Ch. 8, §192, printed Appendix hereto, page 11. Consequently the only purpose of expenditures on his part (independently of cargo) would be to complete the voyage and earn the freight.

necessarily incurred to avoid greater loss), it is apparent that the cargo would have been lost or more seriously damaged, and the cargo owners would have had a larger claim against the "Sucarseco", the validity of which could not have been questioned.

In the case of *The Irrawaddy*, 171 U. S. 187, this Court held that although under the Harter Act* negligence in navigation no longer rendered a shipowner liable for damage to cargo, nevertheless such negligence was still a bar to any claim made by the shipowner against the cargo for contribution to general average sacrifices. If the matter had rested there, some support might exist for the petitioner's argument, which seems to be that if the cargo owners had refused to accept the Jason Clause the master would have been bound to incur general average losses and sacrifices for the benefit of the cargo, without hope of reimbursement. This precise argument, however, was made and rejected in this Court in the very case from which the *Jason Clause* takes its name. In the case of *The Jason*, 225 U. S. 32, 54, this Court said:

> "But it is further insisted that the duty of the master to save the imperiled property extends so far as to call for a sacrifice of a part of the owner's property if necessary to save the cargo. In our opinion the master's duty as agent of the owner is not so extensive. If it were, there would be an end at once of all contribution in general average for ship's sacrifices, for such sacrifices could not be deemed voluntary and extraordinary, if made in performance of the owner's general duty to his cargo."

As already pointed out, the major premise of petitioner's argument (Petitioner's Brief, Point I, p. 12) is untenable in the light of this decision.

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* Act of February 13, 1893, U. S. Code, Title 46, Ch. 8, §192, printed Appendix hereto, page 11.

From the foregoing it is apparent that as a result of the decision in *The Irrawaddy, supra,* some agreement such as the *Jason Clause* was essential to avoid a serious impasse in the case of every marine disaster which was, or might be, attributable to negligence in navigation. The shipowner was not liable for damage to the cargo; but, on the other hand, he was not bound to incur general average sacrifices or expenses for account of the cargo. The *Jason Clause* afforded a way out of this dilemma by giving the master authority, notwithstanding any previous negligence in navigation, to incur general average expenses for the direct account of the cargo. It may well be that the master would have this authority even without the *Jason Clause.* The actual decision in *The Irrawaddy* related only to physical sacrifices of the shipowner's property, and did not deal with the master's authority to bind cargo for its share of any expenditures which might become necessary for the common safety in a port of refuge. But whether the master had this authority or not, it was eminently desirable that he should have it; and any doubt on the subject was resolved by the *Jason Clause.* Under that clause the master has authority as the cargo owner's representative to incur whatever expenses may be necessary to save cargo from impending peril. Reason requires, and the Circuit Court of Appeals has held, that expenses so incurred by the master are recoverable from a third party *tort feasor* in the same manner as expenses incurred by the cargo owner himself or by an independent salvor. So long as the rule for division of the expenses incurred to minimize the loss, as between the vessel owner and the cargo interest, is reasonable, the third party tort feasor cannot complain, *The Minnetonka* (1905), Prob. Div. 206, 215, 216. The shipowner (petitioner here), who is a party to the contract, is, of course, in no position to assert that the division is unreasonable.

Much of the petitioner's argument has to do with the apportionment of damages between the two vessels, in determining the ultimate single liability pursuant to the rule laid down by this Court in the case of *The Chattahoochee,* 173 U. S. 540. It is suggested that the liability of the "Sucarseco" to the "Toluma" cargo is affected in some way by the fact that half of the recovery by cargo can be offset by the "Sucarseco" against the claim of the "Toluma". We submit that all of this discussion is entirely irrelevant. The liability of the "Sucarseco" to the cargo of the "Toluma" is not dependent upon and cannot be affected by the principles which govern the adjustment of damages as between the "Sucarseco" and the "Toluma". These rules of adjustment do not come into play until the liability of the "Sucarseco" has been established; they have no bearing on the liability but only govern the final apportionment of damages between the two vessels. Such was the decision of this Court in *The Chattahoochee, supra.*

POINT III.

The decision of the District Court was based upon errors which are readily apparent in its opinion.

The suggestion that the decision which this Court is asked to review involves any novel principle is, we submit, entirely without foundation. The Circuit Court of Appeals merely adhered to a principle which has been well settled both in this country and in England for more than a generation. The only novel feature of the present case was the decision of the District Court, which was reversed by the Circuit Court of Appeals. The decision of the District Court was based on a misapprehension which is quite apparent from a reading of its opinion. This misapprehen-

sion is well illustrated by the following passage from the opinion (R., p. 62):

> "Where the damage to hull is caused solely by the fault of a stranger, the primary liability to make the loss good is on the stranger, and the liability of the cargo owner to the ship owner in general average is no more than secondary."

If the cargo owners had contributed to the "damage to hull" of the "Toluma", as suggested in the above quotation, there would be great force in the argument that such a contribution was a private matter between the hull and cargo of the "Toluma", with which the "Sucarseco" was not concerned. Such damage, however, or any other damage directly caused by the collision is, of course, not the subject of general average contribution. Contribution in general average is due not in respect of any damage sustained either by hull or cargo in the collision; but is due only in respect of sacrifices or expenses *voluntarily* incurred by the master, as the representative of all interests, *after the collision has occurred and for the sole purpose of averting further loss. Ralli* v. *Troop,* 157 U. S. 386, 406, 409; *Burton* v. *English* (1883), 12 Q. B. D. 218, 223. It is apparent, therefore, that the opinion of the District Court rested on a false premise.

The decision of the District Court was also influenced by the fact that the court misinterpreted certain language used obiter in a recent decision of the Circuit Court of Appeals, *Pool Shipping Co.* v. *U. S.,* 33 F. (2d) 275 (C. C. A. 2), and gave an erroneous significance to an earlier decision of the District Court, *Ralli* v. *Societa Anonima, etc.,* 222 Fed. 994 (D. C. N. Y.). This is pointed out in the opinion of the Circuit Court of Appeals (R., p. 85).

In the *Ralli* case the collision suit had been tried in England where, contrary to the American rule, cargo's

recovery from the non-carrying vessel is only proportional to the fault of the latter. Hence, the carrying vessel had recovered all that cargo could have recovered in a direct suit against the non-carrying vessel, *i. e.*, one-half; and the owner of the carrying vessel, naturally enough, was only asked and required to account for what he had actually recovered. That decision has no possible bearing on the present case.

The opinion of the Circuit Court of Appeals discusses the case so clearly and comprehensively that we deem it unnecessary to elaborate our argument. The principles involved are well settled and there is no suggestion of any conflict between the circuits. The petitioner's argument never had any foundation except in some collateral remarks made by the Circuit Court of Appeals for the Second Circuit in deciding the *Pool Shipping Company* case, *supra*. That court has now corrected any misunderstanding of its language, saying (R., p. 85):

> "The idea that the liability of the noncarrying ship, when at fault for a collision, to cargo on the carrying ship, is secondary, may be due in part at least to some reference to the position of cargo as that of a surety or insurer in *Pool Shipping Company* v. *United States* (C. C. A.) 33 F. (2d) 275, where the right of the carrying ship to recover as bailee of the cargo was sustained, but that language is not to be torn from its context and given general application."

POINT IV.

The argument on the issues in this case contained in the brief for respondent in No. 525 is irrelevant and is contradicted by the record in that case.

Through different members of the same firm, the lawyers who represent the petitioner in the present case repre-

sent also the respondent in *New York & Cuba Mail Steamship Co.* v. *American Steamship Owners Mutual Protection & Indemnity Association,* No. 525 on the calendar of this Court. They have adopted the novel procedure of devoting most of their argument in No. 525 to the point presented in the present case, although that question did not arise under the decision of the Circuit Court of Appeals in No. 525. While we consider that the argument referred to is wholly irrelevant in No. 525, there is one feature of that case to which we feel we should call attention. Counsel for the respondent in that case argue that the decision of the Circuit Court of Appeals in the present case is contrary to the settled practice in similar cases. So far from supporting this assertion, the record in No. 525 contains the most persuasive evidence to the contrary. It appears from the record in that case that the adjusters who distributed the proceeds of the recovery made by the New York & Cuba Mail Steamship Co. from the Steamship "Hamilton", followed the precise rule laid down by the Circuit Court of Appeals in the present case, *i. e.*, they paid over to cargo interests the full amount of their damages, which consisted almost entirely of general average contributions (Petition in No. 525, p. 2; Record in No. 525, pp. 20 to 23). Accordingly, as against the unsupported statement of counsel for the respondent in No. 525, we have (as the only evidence on the subject) the actual practice of an experienced firm of average adjusters.

CONCLUSION.

We respectfully submit that the petition should be denied.

D. ROGER ENGLAR,
LEONARD J. MATTESON,
Counsel for Respondents, West India Oil Company, and J. H. Senior, Agent, American Insurance Company et al.

Appendix.

HARTER ACT.

If the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service.

U. S. Code, Title 46, Ch. 8, §192.

FILE COPY

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 324.

A/S TIDEMANS REDERI "CUZCO", as owner of the Norwegian Steamship "TOLUMA",

Petitioner,

—against—

Steamship "SUCARNOCO", her engines, boilers, etc., SUBMARINE BOAT CORPORATION,

Respondent,

(and two other cases)

WEST INDIA OIL COMPANY and J. H. SENIOR, Agent, AMERICAN INSURANCE COMPANY, *et al.*,

Respondents.

BRIEF ON BEHALF OF RESPONDENTS, WEST INDIA OIL COMPANY, ET AL.

D. ROGER ENGLAR,
Counsel for Respondents.

LEONARD J. MATTESON,
Of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1934.

No. 524.

AKTIESELSKABET "CUZCO", as owner of the Norwegian Steamship "TOLUMA",

Petitioner,

—against—

Steamship "SUCARSECO", her engines, boilers, etc., SUBMARINE BOAT CORPORATION,

Respondent,

(and two other cases)

WEST INDIA OIL COMPANY and J. H. SENIOR, Agent, AMERICAN INSURANCE COMPANY, *et al.*,

Respondents.

BRIEF ON BEHALF OF RESPONDENTS, WEST INDIA OIL COMPANY, ET AL.

The opinion of the District Court is printed at page 36 of the record and is reported 4 F. Supp. 344. The opinion of the Circuit Court of Appeals is printed at page 51 of the record and is reported 72 F. (2d) 690.

Statement of Case.

This case arises out of a collision between the Norwegian Steamer "Toluma" and the American Steamer "Sucarseco" on the high seas outside the Virginia Capes, on November 22nd, 1928. Three suits were brought as a

result of the collision: a suit by the owners of the "Toluma" against the "Sucarseco"; a suit by the owners of the "Sucarseco" against the "Toluma"; and a suit by the owners and underwriters of the cargo on the "Toluma" (West India Oil Company *et al.*) against the receivers (in equity) of the owners and operating agents of the "Sucarseco".*

By order of court these suits were consolidated; and the consolidated cause was submitted upon an agreed statement of facts, which included a statement that the collision was due to the joint and equal fault of both vessels (R., pp. 43 to 45).

Both of the vessels were damaged in the collision. The "Sucarseco" was able to continue her voyage. The "Toluma", however, was found to be leaking, and she put back to Norfolk as a port of refuge (R., p. 4). A survey at Norfolk disclosed that the bow plating was damaged and "the collision bulkhead was badly bulged" (see survey reports quoted in Petitioner's Brief, Appendix I, p. 60). A considerable part of the expenses incurred at Norfolk were general average expenses (Stipulation of Facts, R., pp. 29-30, paragraphs 3, 4(a), 5 and 6(b)). It is stipulated that the general average is correctly stated and that the statement may be referred to as part of the record (R., pp. 30-31).

The libel of these respondents against the "Sucarseco" was filed to recover two types of damage: (a) physical damage caused by the extra handling at Norfolk, where the cargo was discharged and reloaded in order to permit repairs to the "Toluma"; and (b) the contribution which the "Toluma" cargo had paid to the general average expenses incurred at Norfolk.

---

* Respondents originally filed a libel in rem against the "Sucarseco" in the District of New Jersey, but as a matter of convenience it was agreed that this suit should abide the event of a libel in personam filed in the Southern District of New York where the cross actions between the vessel owners were pending. It is this suit in personam which is brought up in the present proceeding.

The District Court held that these respondents were entitled to recover the amount of the physical damage to cargo; but that they had no direct right of action against the "Sucarseco" for their general average contributions.

The Circuit Court of Appeals reversed the decision of the District Court, and held that these respondents were entitled to recover in full from the "Sucarseco", not only in respect of the physical damage to the cargo but also in respect of the contributions which the cargo had paid in general average.

The Issues Involved.

The case presents a very simple issue which may be stated as follows:

> Where cargo becomes liable to contribute in general average to losses and expenses incurred to minimize the damages resulting from a marine disaster, may the cargo owner recover the amount of this contribution as part of his damages, from one whose fault caused or contributed to the disaster?

In following the petitioner's argument it is important to bear constantly in mind the relationship of the parties to this litigation. These respondents never brought any suit against the petitioner, and admittedly have no cause of action against the petitioner. Excepting for the very elastic and informal procedure in the admiralty courts, the petitioner and the respondents would not even be parties to the same litigation. Under Section 3 of the Harter Act (Act of February 13, 1893, U. S. Code, Title 46, Chapter 8, Section 192) the "Toluma" is exempt from liability to her own cargo for any loss or damage arising from the collision. The "Sucarseco", however, is liable for any damage to the cargo of the "Toluma". Even where both vessels are at

fault the cargo owners, to whom no fault is imputable, may recover in full from the non-carrying vessel. *The Atlas*, 93 U. S. 302; *The New York*, 175 U. S. 187, 209. The owners of the "Toluma" cargo, therefore, are entitled to recover their full damages from the "Sucarseco"; and the only question involved, as between these interests, is whether the cargo's contribution to general average is a part of its damages arising from the collision. That the expenses here in controversy were, in fact, items of legal damage caused by the collision is stipulated (R., p. 28, paragraph 2). Moreover, as between the "Sucarseco" and the "Toluma" cargo, the "Sucarseco's" liability for cargo's share of these expenses is not disputed. The objection to the claim of the respondents is not made by the "Sucarseco", against which the claim was prosecuted, but by the "Toluma", against which the respondents have no claim whatever. This somewhat anomalous situation results from the rules governing the division of collision damages where both vessels are at fault.

In the case of *The North Star*, 106 U. S. 17, this Court held that where two vessels are at fault for a collision the resulting liability between them is for a single sum obtained by striking the balance between them on the principle that each shall bear one-half of the total damages resulting from the collision, that is, there is a single liability in favor of the vessel sustaining the greater loss and against the vessel sustaining the lesser to pay the balance after the damages have been added together and divided.

In *The Chattahoochee*, 173 U. S. 540, 554, 555, this Court held that where damages have been awarded to the owners of cargo against the non-carrying vessel, the owners of the non-carrying vessel are entitled to recoup one-half of the sum so awarded from the carrying vessel when the balance is struck for the purpose of determining the single

liability between them upon the principle of an equal division of damages; and that the method of striking the balance between the vessel owners is not affected by the provisions of the Harter Act, exonerating the carrying vessel from direct liability to its cargo for the cargo damage.

Under the rules above set forth, it follows that the amount of the "Sucaresco's" ultimate contribution to the total damages is not affected by the question whether or not the "Toluma" cargo is entitled to recover its share of the general average. If the "Toluma's" cargo recovers its claim in full, the "Sucarseco" will recoup one-half of this claim from the "Toluma". If, on the other hand, the "Toluma" succeeds in its contention that cargo has no direct right against the "Sucarseco", but is only entitled to its pro rata share of any recovery by the "Toluma", then the "Toluma" will recover one-half of the general average expenses from the "Sucarseco". In other words, the question presented to this Court does not affect the share of the loss ultimately borne by the "Sucarseco", but does affect the share ultimately borne by the "Toluma".

Upon analysis it will be found that much of the petitioner's argument has to do with the apportionment of damages between the two vessels, in determining the ultimate single liability pursuant to the rule laid down by this Court in the case of *The Chattahoochee, supra*. It is suggested that the liability of the "Sucarseco" to the "Toluma" cargo is affected in some way by the fact that half of the recovery by cargo can be offset by the "Sucarseco" against the claim of the "Toluma". We submit that all of this discussion is entirely irrelevant. The liability of the "Sucarseco" to the cargo of the "Toluma" is not dependent upon and cannot be affected by the principles which govern the adjustment of damages as between the "Sucarseco" and the "Toluma". These rules of adjustment do not come into play until the liability of the "Sucarseco" has been established; they have no bearing on the liability but only govern the

final apportionment of damages between the two vessels. Such was the decision of this Court in *The Chattahoochee, supra.*

We submit, therefore, that this Court is not concerned here with any recourse the "Sucarseco" may have against the "Toluma" or others; but only with the simple question whether a contribution by cargo in a general average rendered necessary by a collision is recoverable as part of the collision damages. This question was answered in the affirmative, both here and in England, many years ago, and these decisions have long been accepted as establishing the law in both countries.

POINT I.

Cargo's contributions in general average are a part of Cargo's collision damage, and should be dealt with in the same manner as physical damage.

The right of cargo owners to recover general average contributions as part of their collision damage was upheld more than forty years ago by Judge Addison Brown in the Southern District of New York and, on appeal, by the Circuit Court of Appeals for the Second Circuit. Until very recently the rule as then laid down has been accepted as settled law. The rule in England is the same. The decision of the District Court in the present case was the first decision in which any court has ever denied the right of cargo owners to include general average contributions among their damages recoverable from the non-carrying vessel.

In the case of *The Energia*, 61 Fed. 222 (affirmed 66 Fed. 604), the steamship "Energia", outward bound from New York to Shanghai, China, collided with the schooner "Wild Pigeon" in the Lower Bay. The "Energia" sustained damage and returned to New York for repairs, just as the

"Toluma" returned to Norfolk in this case. General average losses and expenses were incurred in this connection and the "Energia" after completing repairs continued her voyage and arrived at her destination at Shanghai. There cash deposits were required from the various cargo interests to cover their share of general average and special charges. After preparation of the usual adjustment, cargo's share of these charges was paid out of these deposits. The cargo interests brought suit against the "Energia" at New York *to recover their damages resulting from the collision*, including the general average and special charges exacted from the cargo upon adjustment at Shanghai. The court had previously found that the "Energia" was solely at fault for the collision and liable for the collision damage (*The Energia*, 56 Fed. 124). The case arose prior to the enactment of the Harter Act, and the court held that the cargo interests could properly maintain an action against the carrying vessel for damages resulting from the collision under the law as it then existed. *The action was solely in tort, and not on the contract of affreightment.* On appeal, the Circuit Court of Appeals gave special consideration to the question of the right of the cargo interests to recover from the vessel, *as collision damage*, the general average and special charges exacted from the cargo upon adjustment at Shanghai. Judge Lacombe, speaking for the court, said (66 Fed. 604, at p. 608):

> "It only remains to consider the claim to be reimbursed for the general average and special charges exacted from the cargo upon adjustment at Shanghai. Upon this branch of the case, we concur in the reasoning and conclusion of the district judge, as expressed in the following excerpt from his opinion:
>
> *'I do not perceive any sound reason, in justice or in common sense, why both the general and the particular average charges, to which the residue of the cargo is legally subject in Shanghai, should*

not enter into the damages to be recovered for this collision. The Rule of damages here is "restitutio in integrum" (The Potomac, 105 U. S. 630); and this rule as plainly demands compensation for a charge or expense lawfully imposed upon this sound part of the cargo as for a deterioration or physical injury to another part, when both are equally the direct results of the collision. The loss to the cargo owner is alike in both, and both, upon the stipulated facts, are alike the direct and natural consequence of the collision. It is immaterial that the charge or expense in dispute has to be paid at Shanghai, instead of here, or that it is payable to the shipowner who is in fault, so long as the charge is a lawful one where it arises. If the exaction were an illegal one, no claim for it would arise here, for then it would not be the proper and natural result of the collision, but of a new agency, and an independent wrong, for which an independent remedy must be sought. But by our law, as well as by the English law, all average charges for the voyage are to be determined and adjusted by the law of the place of destination, which in this case was Shanghai, governed by English law. From the moment of collision, therefore, the sound part of the cargo became liable to these average charges, should it ever reach its destination; and, as that destination has been reached, that item of damage has become fixed, and is therefore recoverable here, as one of the direct and necessary legal results of the collision.' **61 Fed. 223.**

The appellant contends that this conclusion is fallacious, because general average contribution neither arises by the collision nor while in the port of New York, but is the striking of a balance of the entire transactions of the voyage, and is therefore only recoverable at the place of destination, where vessel and cargo are finally separated. This criticism, however, is without force in the case at

bar. All the average charges, both general and special, were for expenses incurred as a direct consequence of this collision, unaffected by any of the subsequent transactions of the voyage. The circumstance that they were collected from the cargo only when the voyage was terminated is immaterial. The 'contribution' between the various interests—ship, freight, and cargo—may, indeed, be said to arise only when a process of adjustment has determined the amount to be paid by the respective shares. *But the necessity of paying out money in order to enable surviving cargo to secure transportation to its original destination in the vessel by which it was shipped arose here. Whether it was paid here in the first instance by the cargo owner himself, or was paid by the shipowner who thereafter repaid himself out of the cargo owner's goods, it was equally an expense which was the necessary result of the collision; it 'arose' at the moment of collision; and it is immaterial when it was paid.*" (Italics ours.)

The general average charges borne by cargo in the present case, for which recovery is sought by the cargo interests, were likewise the necessary result of the collision (Stipulation of Facts, R., p. 28, paragraph 2) and fall squarely within the principles above stated.

The same rule was laid down in England in 1905 by the Court of Appeal in the case of *The Minnetonka* (1905) Prob. Div. 206.

The facts of the case presented in *The Minnetonka,* and the decision, are so significant in considering the questions raised by the "Toluma" here, that we believe that decision is entitled to very careful consideration.

The circumstances in the case of *The Minnetonka* were that a collision had occurred between a collier named the "Uskmoor", laden with a cargo of coal, and the "Minnetonka", as a result of which the "Uskmoor" had been

compelled to return to port for repairs. It was then apparent that it would be necessary to discharge, store and reload the cargo as well as incur substantial delay if the "Uskmoor" were to carry her cargo to destination. The expenses of discharging, storing and reloading would be apportioned in general average and the cargo would have to bear a substantial portion thereof in addition to paying freight for the voyage if completed. In order to avoid this expense the Admiralty, which was the owner of the cargo, entered into a compromise by which it was agreed that the Admiralty would pay to the owners of the "Uskmoor" a sum somewhat less than the estimated amount of what cargo's contribution in general average would be if the voyage were completed, in consideration of which the shipowner gave up his right to complete the voyage and earn the freight. The Admiralty then brought suit against the "Minnetonka" to recover the cargo damages resulting from this collision and the question presented to the court was whether or not the sum paid by the Admiralty in compromise of, and as a substitute for, prospective general average charges was an element of damages which could be recovered from the "Minnetonka". The court found both vessels at fault, and held that the sum so paid was a proper item of cargo damage.

Clearly the Court considered that if the voyage had been continued and the general average expenses incurred, the Admiralty, as owner of the cargo, would have been entitled to recover a moiety (under the English rule*)

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* The English rule, of course, differs from the American rule as to the liability of the non-carrying vessel for damage to cargo in collision cases. In the English admiralty courts the liability of a colliding vessel, even to innocent cargo, is only in proportion to fault. See Carver on Carriage of Goods by Sea, Seventh Edition, Section 698, pages 966 to 969. See also The Atlas, 93 U. S. 302, 317, where this Court declined to follow the English rule as laid down in the case of The Milan, Lush. Adm. 401.

of its contributions to those charges from the "Minnetonka", for it would be absurd to say that the Admiralty could not recover its contributions in general average but could recover a sum paid in compromise of, and as a substitute for, those general average contributions.

As against the decision in *The Minnetonka*, the petitioner cites the earlier English case of *The Marpessa*, (1891) Prob. Div. 403. This was a decision by a court of first instance, and was never appealed. When it was cited to Judge Brown in the case of the *Energia*, *supra*, he said, "* * * I confess myself not satisfied with the reasoning or the decision in the case of the *Marpessa*" (61 Fed. at p. 223). In the case of *The Marpessa*, cargo had been jettisoned, after a collision, and the carrying vessel had contributed, in general average, to this sacrifice. The carrying vessel then sought to recover from the non-carrying vessel the amount of this contribution, as part of the collision damages. It was held that this item was not recoverable. How this decision supports the petitioner's argument is not apparent to us. The suit was by the shipowner, not by the cargo owner. So far as the case is material in the present litigation, it would seem to support an argument that the expenses in controversy here are not recoverable from the "Sucarseco" at all,—either by the "Toluma" or by her cargo. In all fairness, we think it must be conceded that the *Marpessa* decision has been overruled by the decision of the Court of Appeal in the *Minnetonka*. However, if the *Marpessa* and the *Minnetonka* were to be regarded as consistent with each other, the result of the two cases is exactly contrary to appellee's contention. The combined effect of the two decisions would seem to be that general average expenses are recoverable by cargo but not by the carrying vessel.

The rule laid down in *The Energia* has been repeatedly stated and applied by the courts.

In *Ralli* v. *Societa, etc.*, 222 Fed. 994, 999 (S. D. N. Y.), Judge Mayer said:

> "Under our law general average contributions are regarded as part of the damage. *The Energia* (D. C.), 61 Fed. 222, affirmed 66 Fed. 604, 18 C. C. A. 653; *Erie & Western Transportation Co.* v. *City of Chicago*, 178 Fed. 42, 51, 101 C. C. A. 170."

In the case of *Erie & Western Transportation Company* v. *City of Chicago*, cited in the above quotation, the rule of *The Energia* was adopted by the Circuit Court of Appeals for the 7th Circuit.

In *Gray's Harbor Tugboat Co.* v. *Petersen*, 250 Fed. 956, 959, the same rule was adopted by the Circuit Court of Appeals for the 9th Circuit.

In *The Corning*, 1928 A. M. C. 1495, 1497, the same rule was applied by a Commissioner of the United States District Court for the Southern District of New York. At the page last cited, the Commissioner said:

> "General average expenses are properly chargeable to the collision. *Corning, supra; Energia*, 61 Fed. 222, affirmed 66 Fed. 604; *Erie & Western Transportation Co.* v. *Chicago*, 178 Fed. 42; *Ralli* v. *Societa Anonima, etc.*, 222 Fed. 994; *Gray's Harbor Tugboat Co.* v. *Petersen*, 250 Fed. 956.
>
> The rule is too well established, both in reason and in authority, to justify the consideration by the District Court, or its Commissioner, of authorities in foreign jurisdictions."

See also:

Waubesa, 1928 A. M. C. 1710, 1715, 1716.

The manner in which the rule of *The Energia* has been accepted commercially is well illustrated in the case of

the *New York & Cuba Mail Steamship Co.* v. *American Steamship Owners Mutual Protection & Indemnity Association, Inc.*, 4 F. Supp. 347. There also, both vessels were at fault. It appears from the opinion that the recovery in that case was distributed on the theory that cargo had a direct claim against the non-carrying vessel for the amount of cargo's general average contributions; and these contributions were paid to the cargo in full out of the recovery. The recovery was in the hands of the shipowner, and the distribution was made by adjusters employed by the shipowner. We quote as follows from the opinion of the District Court:

> "The libellant then treated the payment of $44,274.31 made by the *Hamilton* as including $28,729.94 for the *Mexico's* cargo, this figure being made up of cargo's contribution in general average in the sum of $28,659.12 and direct damage to cargo in the sum of $70.82. The theory of the adjustment was that the *Mexico's* cargo had had a direct claim against the *Hamilton* (asserted by the libellant as bailee of cargo) for this $28,729.94, and that one-half of this amount $14,364.97, had been allowed to the *Hamilton* against the *Mexico* as part of the former's damage" (p. 347).

The decision of the District Court in that case was rendered by the same judge and at the same time as the decision in the present case; but the case was reversed by the Circuit Court of Appeals on other grounds, so that the point involved here was not considered in that court. 72 F. (2d) 694. This Court later denied *certiorari* (525 on the calendar of this Court). We cite the case not for the decision but merely as showing the practice of experienced adjusters based on the rule of the *Energia*.

Another interesting case in this connection is the case of the *Petition of United States Steel Products Company*

(*The Steel Inventor*), 16 F. (2d) 306. Judge Hough there said:

> "For present purposes it may be assumed that the petitioner and all the other persons and corporations enumerated possess whatever rights they do possess as the owners of cargo laden upon the 'Steel Inventor'. *This is said, because I think it makes no difference whether the claims sought to be propounded are for general average charges or not; the right in which every claim must be advanced is that of a cargo owner; it is only as cargo owners that these people have any rights at all.*" (Italics ours.)

This case went twice to the Circuit Court of Appeals, 24 F. (2d) 657; 43 F. (2d) 958. That court first upheld the right of the cargo interests to intervene; but later dismissed their claim on the merits. The importance of the case for our present purpose is that the damages were fixed in accordance with Judge Hough's ruling as above quoted; and this ruling was never disputed during the later stages of the case, although it appears from the record that most of the admiralty lawyers in New York City were interested in the case in one capacity or another.

As opposed to the authorities above cited, there is not a single decision which lends any support to the petitioner's theory. The cases of *Pool Shipping Co.* v. *United States*, 33 F. (2d) 275, and *Ralli* v. *Societa Anonima, etc.*, 222 Fed. 994, have no bearing whatever on the present case. This is pointed out in the opinion of the Circuit Court of Appeals as follows:

> "The idea that the liability of the non-carrying ship, when at fault for a collision, to cargo on the carrying ship, is secondary, may be due in part at least to some reference to the position of cargo as that of a surety or insurer in *Pool Shipping Company* v. *United States* (C. C. A.), 33 F. (2d) 275,

where the right of the carrying ship to recover as bailee of the cargo was sustained, but that language is not to be torn from its context and given general application. Nor is there anything contrary to our conclusion here in *Ralli* v. *Societa Anonima, etc., supra,* where the carrying vessel jointly at fault for the collision had been credited with one-half of the general average contributions in the division of damages between the ships and was required to account to its cargo for this credit" (R., p. 55).

The *Pool Shipping Company* case merely held that the owner of the carrying ship may recover as bailee of the cargo, just as the owner of cargo could recover in a separate action.

The *Ralli* case merely held that where the carrying vessel sues the non-carrying vessel and is credited, after a finding of mutual fault, with any part of the general average contributions paid by cargo, it must account to cargo for such recovery. It follows naturally that the obligation to account is only to account for what has been received. In that case the carrying vessel, the "Aristea", had been held jointly at fault, and liable for one-half of the total damages resulting from the collision. The owners of the "Aristea" included in their statement of their own damages the amounts which they had expended for items of a general average nature, apparently without disclosing the fact that these items had been the subject of contribution in general average. The owners of the "Aristea" had, therefore, been credited with 50% of the general average items and were held accountable to the cargo interest *for its proportion of this credit.* The reason why the shipowner had only recovered one-half of the general average contributions clearly appears from the facts stated in the opinion. The collision had occurred in British waters and the collision suit had been tried in the British courts. Accordingly, the rights of the parties growing out of the

collision were governed entirely by British law. Under British law, of course, the liability of a vessel for collision damages is proportional to her fault, even as against innocent cargo. (See footnote on p. 10, *supra.*) The cargo interests, therefore, recovered exactly the same amount which they would have recovered if they had brought an independent suit against the non-carrying vessel in the British courts.

The case of *The Andree-The Alexander,* 47 F. (2d) 874, stands on the same footing as *Ralli* v. *Societa Anonima, etc.*, excepting that it was not complicated by the application of any foreign law. In the *Andree-Alexander* case the only claim of the libellants was to share in a recovery which had been effected by the carrying vessel from the non-carrying vessel. The extent of the non-carrying vessel's liability had been the subject of a previous litigation which had been compromised on the basis of the non-carrying vessel paying 90% of the damages. All of the parties to the later litigation (to which the petitioner refers) had been parties to the earlier litigation against the non-carrying vessel, and had agreed to the settlement. Accordingly, the question involved in the present case was not even remotely involved in the *Andree-Alexander* case. The amount of the recovery was fixed and the only question was whether certain lienors were entitled to share in that recovery. The fact that the case is cited at all merely shows what straws the petitioner is forced to grasp in an effort to find some authority for its position.

We submit that a rule as long established as the rule laid down in the *Energia,* which has been so uniformly accepted for many years by persons interested in maritime affairs, should not lightly be set aside. We think the present is a typical case for the application of the rule of *stare decisis.*

POINT II.

The petitioner's argument is contrary to the stipulated facts and to the fundamental principles of general average. Although the petitioner has stipulated that the expenses in controversy were properly allowed and collected in general average its argument is based on the assumption that these expenses were incurred by the shipowner for its own account pursuant to its general duty as carrier and bailee.

Certainly if there is any single fact in the present case which may be considered fundamental, it is the fact that the expenses which the respondents seek to recover from the "Sucarseco" were general average expenses. This fact has been stipulated (R., pp. 29-30, paragraphs 3, 4a, 5 and 6b). Nor did the petitioner stipulate this fact without ample reasons. Petitioner had collected cargo's share of these expenses from the respondents on the sole ground that they were general average expenses. Excepting as general average expenses the petitioner could not have claimed any share of them from the respondents, and the respondents would have been under no obligation to contribute to them.

As the Circuit Court of Appeals well said:

> "Since it is agreed that all of the contributions were of a general average nature in settlement of expenses properly includable in the average adjustment, we need not now pay further attention to that phase of the matter" (R., p. 54).

For a detailed discussion of the reasons why port of refuge expenses are considered to be of a general average nature, we refer to Lowndes, General Average, 6th ed., pages 221, etc., and Congdon, General Average, 2nd ed., pages 122, etc. It is sufficient for the purposes of this dis-

cussion to point out that these expenses are deemed to be the result of the decision of the master to seek a port of refuge in order to avert a total loss; a decision which, of course, necessarily involved a considerable expenditure on the part of all interests. As the "Toluma" was leaking, and it was dangerous for her to proceed, it was admittedly good judgment on the part of the master to seek a port of refuge. The necessary expense of this action is regarded as resulting from the master's decision. Thus, in *Ralli* v. *Troop*, 157 U. S. 386, at page 407, this Court quoted with approval from a note by Mr. Justice Shee to Abbott on Shipping, as follows:

> "Expenses voluntarily and successfully incurred, *or the necessary consequences of resolutions voluntarily and successfully taken*, by a person in charge of a sea adventure, for the safety of life, ship and cargo, under the pressure of a danger of total loss or destruction imminent and common to them, give, the ship being saved, a claim to general average contribution." (Italics ours.)

In the same opinion (at p. 413) this Court quoted the following passage from the opinion of Judge Jenkins in *The Roanoke*, 46 Fed. 297, 299:

> "The master must be presumed to have designed the consequences necessarily resulting from the act directed."

When the master of the "Toluma" made the decision to put back to Norfolk, he, of course, knew that this act would subject both ship and cargo to various liens and charges for disbursements which would necessarily be incurred there. By his act, therefore, he sacrificed a part of the value of all the interests involved in the adventure. This sacrifice was justified by the fact that the expense incurred at Norfolk presumably saved both the leaking vessel and her cargo

from total loss. Some of the expenses at Norfolk were, of course, special charges on particular interests; the repairs to the vessel, for example, were for the shipowner's account. A very substantial part of the expense, however, was of a general average nature. It is agreed by all that the apportionment of the expenses in this case has been duly and properly made (R., p. 30, paragraph 6 (b)) and that all the expenses which are the subject of this controversy were "caused by the collision" (R., p. 28, paragraph 2).

There is nothing unusual or extraordinary about the general average expenses in the present case. Port of refuge expenses are one of the most common types of general average expenditures in modern practice, as can readily be confirmed by reference to the leading text books on the subject (see Lowndes on General Average and Congdon on General Average, cited, *supra*, p. 17).

The character of the expenses incurred or sacrifices made to save the ship and cargo from peril or greater loss is immaterial. On this point Lowndes quotes from a leading English case as follows:

> "It is immaterial whether a shipowner sacrifices a cable or an anchor to get the ship off the shoal, or pays the worth of it to hire those extra services which get her off. *Kemp* v. *Halliday*, 6 B. & S. 723, 746" (Lowndes, General Average, 6th ed., p. 23).

Ordinarily we should consider it unnecessary and improper to deal at such length with a fact which has been stipulated, *i. e.*, the fact that the expenses in controversy were properly allowed and collected in general average. In the present case, however, although it is stipulated that these expenses are of a general average nature, the petitioner's argument necessarily involves the contrary assumption.

The District Court, which adopted the petitioner's argument, made the following statements which clearly disclose the error underlying its decision (R., pp. 38-9):

> "Where the *damage to hull* is caused solely by the fault of a stranger, the primary liability to make the loss good is on the stranger, and the liability of the cargo owner to the ship owner in general average is no more than secondary.
>
> * * * * * * * * *
>
> "From these views it must follow that the cargo owner whose goods have not been injured but who has paid contribution in general average toward making good *the loss suffered by his carrier* in a collision with another vessel in which both vessels were guilty of negligent navigation has no direct right of action against the other vessel. His only basis of recovery against the other vessel is by subrogation to the right of the carrier." (Italics ours.)

If the cargo owners had contributed to the "damage to hull" of the "Toluma", as suggested in the above quotation, there would be great force in the argument that such a contribution was a private matter between the hull and cargo of the "Toluma", with which the "Sucarseco" was not concerned. Such damage, however, is obviously not a subject of general average contribution. Contribution in general average is due not in respect of any damage sustained either by hull or cargo in the collision; but is due only in respect of sacrifices or expenses *voluntarily* incurred by the master, as the representative of all interests, *after the collision has occurred and for the sole purpose of averting further loss.*

The Circuit Court of Appeals rejected the argument which had prevailed in the District Court and pointed out the obvious fallacy which it involved. In this Court the

petitioner has modified its argument and has endeavored to state its position in such a way as to avoid conflict with the stipulated facts. This, however, has proved an impossible task. Repeatedly throughout its brief the petitioner speaks of the expenses in controversy as though they constituted a damage sustained by the shipowner in which the cargo had no direct interest. In connection with the passages quoted above from the opinion of the District Court, we quote the following passage from page 58 of the petitioner's brief:

> "If by reason of the special contract between the carrying vessel and its cargo, the cargo by contract *pays to the carrying vessel certain portions of the damages sustained by the carrying vessel*,* it is only right and equitable that the cargo paying such items by contract should be reimbursed by the carrying vessel to the extent (only) of a *ratable* share of the recovery made from the non-carrying vessel for these items."

In considering the petitioner's argument, therefore, it becomes necessary to inquire into the nature of general average sacrifices and expenditures. By whom and in what capacity, and for whose account are they made? Do they constitute a damage suffered only by those who made them in the first instance; or are they made for account and at the expense of all the interests in the adventure? The text books and other authorities dealing with general average are very ancient and very voluminous. On the other hand, the principles involved here are few and well settled. We believe that they are all sufficiently covered in the opinion of this Court in the case of *Ralli* v. *Troop*, 157 U. S. 386, to which we have already referred. In that case this Court discussed the basic principles of general average at some length, and with numerous citations of authority. We think it is

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* Italics ours.

unnecessary for us to go outside of that opinion for a statement of the principles upon which we rely. We believe that the law of general average, so far as material to the present case, is summarized in two sentences which we will quote from the opinion of this Court in *Ralli* v. *Troop*:

> "In the earliest case in this court, Mr. Justice Story, in delivering judgment, stated the leading limitations and conditions, as recognized by all maritime nations, to justify a general contribution, as follows: 'First, that the ship and cargo should be placed in a common imminent peril; secondly, that there should be a voluntary sacrifice of property to avert that peril; and, thirdly, that by that sacrifice the safety of the other property should be presently and successfully attained.' *Columbian Ins. Co.* v. *Ashby*, 13 Pet. 331, 338" (157 U. S., p. 394).
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> * * * * * * * * *
>
> "There can be no general average, unless there has been a voluntary and successful sacrifice of part of the maritime adventure, made *for the benefit of the whole adventure, and for no other purpose, and by order of the owners of all the interests included in the common adventure, or the authorized representative of all of them.*" (157 U. S., p. 403.) (Italics ours.)

We call particular attention to two principles laid down in the above quotations. First, that the sacrifice must be a *voluntary* sacrifice, to avert a *common* imminent peril; and, second, that the master, in making the sacrifice acts not merely as a representative of the shipowner, but as the authorized representative of all parties to the adventure. Unless a sacrifice (or expenditure) complies with these conditions it cannot properly be allowed in general average; and it is stipulated that the expenditures here in controversy were properly allowed in general average.

As to the capacity in which the master acts, the opinion in *Ralli* v. *Troop* cites abundant authority. At page 397 this Court quoted the following language from *Burton* v. *English*, 12 Q. B. D. 218, 220, 221:

> "This claim for average contribution, at all events, is part of the law of the sea, and it certainly arises in consequence of an act done *by the captain as agent, not for the shipowner alone, but also for the cargo owner*, by which act he jettisons part of the cargo on the implied basis that contribution will be made by the ship and by the other owners of cargo." (Italics ours.)

Further down on the same page (397) the opinion continues as follows:

> "Sir William Scott, speaking of the powers and duties of the master, said: 'Though in the ordinary state of things he is a stranger to the cargo, beyond the purposes of safe custody and conveyance, yet in cases of instant and unforeseen and unprovided necessity, *the character of agent and supercargo is forced upon him*, not by the immediate act and appointment of the owner, but by the general policy of the law; unless the law can be supposed to mean that valuable property in his hand is to be left without protection and care. It must unavoidably be admitted, that in some cases he must exercise the discretion of an authorized agent over the cargo, as well in the prosecution of the voyage at sea, as in intermediate ports, into which he may be compelled to enter.' He illustrated this by the case of jettison to be contributed for in general average, by the case of ransom, and by the case of sale of perishable cargo in a port of necessity, and added: 'In all these cases, the character of agent respecting the cargo is thrown upon the master, by the policy of the law, acting on the necessity of the circumstances in which he is placed.' *The Gratitudine*, 3 C. Rob. 240, 257, 258, 260." (Italics ours.)

The authorities thus establish that the sacrifices and expenditures incurred to save ship and cargo from a common peril are obligations of the cargo and of the shipowner to the extent of their respective interests. The purpose of the general average adjustment is to ascertain the extent of such interest and thus apportion between the cargo and the ship the sums for which they are respectively liable. The sum for which each is liable is called its contribution in general average. So far as the liability of the non-carrying vessel is concerned, there is no difference between direct physical damage to the cargo and damages which are sustained to avert or minimize a loss. *The Energia* (*supra*). In other words, sacrifices are made and expenditures are incurred to save cargo and the ship from further loss. It is immaterial that these sacrifices have been made or that the expenditures are incurred in the first instance by the master of the ship rather than by the owner of the cargo personally; because in making the sacrifices and incurring the expenditures, the master acts as agent of cargo in so far as cargo is interested. The fact that a general average adjustment is required to determine to what extent cargo is interested, is immaterial. The master binds cargo by his act when he makes the sacrifices and incurs the expenses; for the law makes him cargo's agent in time of peril, and authorizes him to bind cargo to pay its share of the sacrifices and of the expenses. *Ralli* v. *Troop* (*supra*).

In former years it was not uncommon for the cargo owner to send a supercargo on the ship to look after his interests. Surely, if the cargo were placed in jeopardy as a result of a collision, and the supercargo incurred reasonable and proper expenditures to protect it, there could be no question as to the cargo owner's right to recover these expenditures as part of his damage resulting from the collision. How can the result be different, because, pursuant to well-settled custom and usage, the mas-

ter, in time of danger, is charged with the duties of a supercargo?* As appears from the authorities above cited, the master is, under such circumstances, the agent of the cargo owner and authorized to incur expenditures for his account. So long as he acts prudently and properly in the interest of the cargo owner, what possible difference can it make to a third party *tort feasor* that he happens to be the master of the ship as well as the representative of the cargo?

The circumstance that the sums here in controversy were paid out in the first instance by the petitioner is unimportant, since it is clear that these payments were made in a representative capacity. When the petitioner advanced the funds for payment of the port of refuge expenses, it did so on ample security, and was compensated for its outlay both by an allowance of interest on the various items and by a commission on the amount of its disbursements. The shipowner took no risk; it insured the disbursements made at Norfolk pending the arrival of the cargo at destination and the cost of this insurance was allowed to it as a general average expense (Item $250.00, G. A. Statement, p. 93). At destination the shipowner secured from the cargo interests, pursuant to its duty, security either by average agreement with sufficient guarantee (R., p. 31, paragraph 6(c); R., pp. 33-5), or cash deposits, as shown in the average statement. It was allowed interest on its general average disbursements and allowances to the date of the adjustment, plus the period of further probable outlay pending collection, in the sums of $1482.89 and $201.36 (G. A. Statement, p. 135), and compensation consisting of "Commission on General Average disbursements and Advancing Funds at 2½%" in the sum of $707.82 (G. A. Statement, p. 119). It was further allowed "For Commission, Collecting and Settling

* See language of Lord Stowell in The Gratitudine, supra, p. 23.

the General Average at 2½%" the sum of $1099.02 (G. A. Statement, p. 143). These entirely apart from the services of the adjusters (G. A. Statement, p. 141). These items were all credited to the vessel owner in the settlement (G. A. Statement, pp. 179, 181).

The settlement of the accounts arising from a general average sacrifice or disbursement is not only a duty but is also a privilege which may be quite profitable to the shipowner.

Barnard v. *Adams*, 10 How. (U. S.) 270;
Sturgis v. *Cary*, Fed. Cas. No. 13,573;
Gulf Refining Co. v. *Universal Insurance Co.*, 32 F. (2d) 555; *certiorari* denied 280 U. S. 584.

The circumstances above set forth show clearly that the disbursements incurred by the petitioner at Norfolk were not for its own account and consequently shipowner's damages, but were merely advances by the shipowner for account of all interests. This advance was made for a consideration and on ample security, pending allocation to the respective interests and collection from each of its respective share. If the shipowner had not been able, or had not wished, to advance these expenses, the cargo might have been called upon at the time to advance its share, failing which the master might have sold or pledged the cargo to obtain funds to pay the disbursements to enable the vessel to proceed on her voyage—

Bank of St. Thomas v. *Julia Blake & Cargo*, 107 U. S. 418, 426, 427;
Congdon, General Average, 2nd ed., pages 16-17;
Lowndes, General Average, 6th ed., pages 335, *et seq.;*
Scrutton on Charter Parties and Bills of Lading, 13th ed., page 318.

Where the expenses in a port of distress are particularly heavy, it is not unusual for cargo interests to pay their own estimated share in the first instance, instead of relying on the shipowner to act as banker until the amount of the respective contributions can be accurately computed. Surely, the liability of a third party *tort-feasor* cannot depend on the question whether ship or cargo advances, in the first instance, the funds required for the port of refuge expenses.

If the cargo owners themselves had been present and had incurred necessary expenses for the preservation of their cargo, their right to recover such expenses could scarcely be disputed. The same would be true if the master, after disaster, had communicated with them and asked their authority to incur necessary expenses on their behalf to save the cargo. In such a case, as the Circuit Court of Appeals pointed out in *The Jason*, the agreement would be valid even without the Harter Act and without any special provision in the bill of lading. *The Jason*, 178 Fed. 414, at pages 416-17. Why the giving of such authority in advance should alter the legal situation as against a third party, is difficult to understand.

The petitioner apparently would not dispute the cargo owner's right to recover salvage which he was forced to pay to an independent salvor who intervened and acquired a lien on the cargo, for services rendered in saving it from peril after the collision. It claims, however, that because authority to incur expense for cargo's account was given in advance to the master of the vessel (obviously the person best situated to act for all interests) the expense so incurred is not recoverable. This argument is wholly unsupported either by logic or by legal authority.

POINT III.

The damages of "Toluma" cargo do not arise from the Jason Clause in the "Toluma" bill of lading and that clause has no bearing on the claim against the "Sucarseco" excepting as it tends to minimize the damages flowing from the tortious act of the "Sucarseco".

One of the petitioner's principal arguments is that the respondents cannot recover their general average contributions from the "Sucarseco" because their obligation to make these contributions arose from the Jason Clause in the "Toluma's" bills of lading. The Jason Clause derives its name from the fact that its validity was upheld by this Court in the case of *The Jason*, 225 U. S. 32. The clause, as set out in the bills of lading issued in the present case, is as follows:*

> "In case of danger, damage or disaster resulting from accident or from faults or errors in navigation or in the management of or from any latent or other defect of the vessel, her machinery or appurtenances, from unseaworthiness, even though existing at the time of shipment or at the beginning of the voyage, if the defect or unseaworthiness was not discoverable by the exercise of due diligence and if the shipowner shall have exercised due diligence to make the vessel seaworthy and properly manned, equipped and supplied with respect to the matters concerned in the aforesaid danger, damage or disaster, then the shippers, consignees or owners of the cargo or the holders of this bill of lading shall nevertheless pay salvage and any special charges incurred in respect of the cargo and *shall contribute with the shipowners in general average*

* The first two sentences of Clause 12 of the bill of lading, as set forth on page 4 of petitioner's brief, form no part of the Jason Clause, and have no bearing on the question in issue here. See opinion of this Court in The Jason, 225 U. S. 32, at page 49.

> to the payment of any sacrifices, losses or *expenses of a general average nature that may be made or incurred for the common benefit or to relieve the adventure of any common peril,* all with the same force and effect and *to the same extent as if such accident, danger, damage or disaster had not resulted from or been occasioned by faults or errors in navigation* or in the management of the vessel or by any latent or other defect or unseaworthiness" (R., p. 32A). (Italics ours.)

This clause is now almost universally used in ocean bills of lading. The District Court refers to it as "the customary Jason Clause" (R., p. 37). See also Congdon General Average, 2nd ed., page 48; *The Isis*, 57 F. (2d) 265, 269; Lowndes General Average, 6th ed., pages 38, 747.

We call attention to the precise terms of the cargo owner's agreement as set forth in the above clause. He does not agree to pay any part of a loss sustained by the shipowner; nor does he agree in general terms to pay expenses resulting from disaster. His agreement is to "contribute with the shipowners in general average * * * to the same extent as if such * * * danger * * * had not resulted from * * * faults or errors in navigation". In a word, the cargo owner agrees to contribute to any proper general average expenses to which he would be liable to contribute in a case where there had been no negligence in the navigation of the carrying vessel.

The Jason Clause does not even require that the shipowner shall advance the amount of any general average expenses in the first instance, although it undoubtedly contemplates that he may do so.

It is clear from its language that the Jason Clause speaks as of the time when danger has arisen; and when some sacrifice or expenditure is necessary for the common benefit. In such a situation, the cargo owner (speaking in

advance through the Jason Clause) says to the master of the vessel (who alone has authority to perform a general average act)—

> "If you will take whatever steps are necessary for the common benefit, I will pay my share of the expense."

Whether this statement is made by the cargo owner when personally present, or through the medium of a clause in the bill of lading, its effect is the same. *It is not a statement that the cargo owner will pay any part of a loss which the shipowner has already sustained; or any part of the loss with which the shipowner is threatened.* It is a statement that the cargo owner will pay *his own share* of expenses properly incurred for the common benefit.

In this connection, it must constantly be borne in mind that the expenses involved here are stipulated to have been necessitated by the collision, and to have been properly allowed in general average. From these agreed facts it results inevitably that the expenses under consideration were incurred for the common benefit and for the purpose of averting imminent danger resulting from the collision. It was only on this basis that the shipowner could compel cargo interests to contribute to these expenses; and having demanded and received such contribution, the "Toluma" is in no position now to dispute the true character of the expenditures.

Throughout its argument the petitioner refuses to recognize the true character of the Jason Clause. Thus, it is argued that obligations arising under the Jason Clause are, as to the "Sucarseco", *res inter alios acta.* This argument could just as well be made as to the bill of the shipyard which repaired the "Toluma". The "Sucarseco" could say with entire truth that it was not a party to the contract between the owners of the "Toluma" and the shipyard which repaired her. The answer to this argument,

however, is plain: the liability of the "Sucarcesco" for the cost of the "Toluma" repairs does not arise out of the contract between the "Toluma" owners and the repair yard, but out of the collision which caused the damage and necessitated the expenditure for repairs. This answer would be equally adequate, although it appeared that the "Toluma" owners had made an annual contract with the shipyard to repair all their vessels which might be damaged. The only question which the "Sucarseco" could raise under such circumstances would be the question whether the contract resulted in a reasonable liquidation of the damages. So, too, the only question which arises in connection with expenditures made pursuant to the Jason Clause, is the question whether such expenditures are reasonable. In this case, however, this question is covered by the stipulation of facts, which shows that the expenses in question here were proper general average expenditures, and that the amount in dispute was the cargo's fair and equitable share of these expenses.

The master's authority to incur expenditures or make sacrifices on behalf of cargo is, of course, subject to the qualification that where the shipowner is liable for the disaster out of which the necessity for the expenditure arises, the master will be deemed to act not as agent for the cargo owner, but as agent for the shipowner, in the performance of the latter's duty to minimize the damages resulting from his own fault. This, so far as we are aware, has always been true under the law of all maritime nations. Any other rule would merely result in circuity of action, as the owner of cargo who had paid a contribution in general average to the shipowner would immediately sue the shipowner to recover back the amount of his payment as part of his damages.

Prior to the passage of the Harter Act in this country, the question arose in England whether a provision in the

contract of affreightment exempting the carrier from liability for the negligence of his servants (this provision being valid under English law) gave the carrier the right to demand contribution from the cargo in respect of a general average rendered necessary by the negligence of the carrier's servants. It was held that as the carrier was no longer liable for the negligence of his servants, such negligence was no bar to his claim in general average. *The Carron Park*, 15 Prob. Div. 203. The same rule appears to have been adopted in France and Belgium (see dissenting opinion in *The Irrawaddy*, 171 U. S. 187, at pp. 199-200; see also, as to French law, petitioner's brief, appendix III, pp. 68-69).

The so-called Harter Act (Act of February 13, 1893, U. S. Code, Title 46, Ch. 8, Sec. 192) modified the law of the United States by providing that a shipowner who had used due diligence to make his ship seaworthy and to have her properly manned and equipped, should not be liable for damage to cargo resulting from negligence in the navigation or management of the ship. The question then arose whether a shipowner who was exempted from liability under this Act was entitled to contribution from cargo for general average sacrifices rendered necessary by negligence in navigation. This question came before Judge Addison Brown in the Southern District of New York in the case of *Chrystal* v. *Flint* (*The Irrawaddy*), 82 Fed. 472. Judge Brown sustained the shipowner's claim for contribution from the cargo saying:

> "* * * I think, that the liability to indemnify the cargo owner is the sole ground of the exclusion of the ship owner's claim to general average compensation for his expenses in rescuing the adventure from a peril caused by bad navigation; and because it, therefore, seems necessarily to follow that in cases where all such liability is abolished by law, as it is

> under the circumstances of this case by the Harter act, no such exclusion can be justified; and that where no such liability exists on the part of the ship or her owner, his right to a general average contribution from the cargo arises necessarily by the same principles of equitable right that apply in ordinary cases of general average" (pp. 474-475).

Judge Brown cited the case of *The Carron Park*, *supra*, and followed the rule there laid down. On appeal (88 Fed. 987) the Circuit Court of Appeals certified the case to this Court, where it is reported as *The Irrawaddy*, 171 U. S. 187.

In considering the decision of this Court in the *Irrawaddy*, it is important to bear in mind precisely what questions were involved in that case. The claim against the cargo consisted of four items which are enumerated in the opinion of the District Court (82 Fed. 472-3). These items were (1) the salvors' compensation, (2) the value of cargo jettisoned, (3) the freight on the cargo jettisoned, (4) the damage to the ship's machinery in her efforts to float herself after the negligent stranding.

It appears from the statement of facts certified to this Court (171 U. S. 188) that the cargo interests had voluntarily paid their respective shares of the first and second items above mentioned. They did not question their liability for expenses incurred on their behalf, but refused to contribute to the shipowner's sacrifices. We mention these facts as showing that the decision in the *Irrawaddy* did not touch the question upon which the petitioner lays so much stress in the present case, *i. e.*, the liability of cargo to contribute to port of refuge expenses of a general average nature. It is plain from the facts of the *Irrawaddy* case that the cargo interests considered themselves clearly liable to pay their share of actual expenditures made to relieve the adventure from peril; and there is nothing in

the opinion of this Court to indicate that it took a contrary view. When these circumstances are considered it seems clear that the decision of this Court in the *Irrawaddy* does not support the petitioner's argument that in the absence of the Jason Clause in the "Toluma" bill of lading these respondents would not have been bound to contribute to the general average expenses incurred at Norfolk.

The actual decision of this Court in the *Irrawaddy* was that the Harter Act, although it exonerated the shipowner from liability for damages sustained by cargo as a result of negligent navigation, did not give him the right to claim any contribution from cargo toward sacrifices rendered necessary by such negligence. This Court declined to follow the rule laid down in the *Carron Park, supra,* and held that although the shipowner was no longer liable for his negligence, such negligence still constituted a bar to any claim against cargo for contribution to general average sacrifices. A dissenting opinion was filed by Mr. Justice Brown and Mr. Justice McKenna.

The situation which existed after the decision in the *Irrawaddy* was unsatisfactory both to shipowners and to owners of cargo. The decision was quite generally construed (as by the petitioner here) as meaning that cargo interests were not bound to contribute to any general average expenditures made by a shipowner following a disaster due to negligent navigation. Under these circumstances shipowners naturally would not incur any expenditures on behalf of cargo, but would call on the cargo owners to come forward and pay their own share of the expenses. Such an attitude on the part of the shipowners could not fail to result in great and sometimes serious loss of time. Even confining the *Irrawaddy* decision to its actual facts, the situation was obviously unsatisfactory. When a vessel stranded through negligence it might be entirely possible to float her by the use of her own power; but this might

result in serious damage to her machinery. If the master knew that the cargo owners need not contribute to any such damage, his natural course would be to call in salvors who would float the vessel and enforce their lien against both ship and cargo. This course might be very much more expensive and might involve dangerous delay.

In order to meet this situation and permit the master to act promptly on behalf of all concerned in the face of threatened disaster, the clause now under consideration was devised. The question of its validity came before this Court in the case of *The Jason*, 225 U. S. 32. The lower courts had held the clause invalid, but the Circuit Court of Appeals had later certified the case to this Court. This Court upheld the validity of the clause.

In support of their contention that the clause was invalid, the owners of the *Jason* cargo made precisely the same argument which the petitioner makes here, *i. e.*, that the sacrifices made and expenses incurred by the shipowner were made in fulfillment of his general duty as carrier and bailee; that he would have been bound to make these sacrifices and incur these expenses in any event; and, therefore, the effect of the clause was to relieve the shipowner of a liability from which he was not relieved by the Harter Act. In view of the insistence with which this same argument is urged in the present case, we desire to quote the language in which this Court answered it in the case of the *Jason*:

> "The argument is that although that act exempts him from the consequences of the negligent stranding, it leaves him still under the duty and obligation of caring for and preserving the cargo, after the stranding; that whenever the safety of the property entrusted to the shipowner is menaced, whether the peril be occasioned by *vis major* or by fault, and

> whether such fault be or be not of such character as to fall within the third section of the Harter Act, 'the master is nevertheless bound to exert every effort to save the property, and if he fail in this duty, his owners are liable to the cargo for the resulting loss'. If by 'every effort' is meant every *reasonable* effort, we see no occasion to question the soundness of the reasoning. But it is further insisted that the duty of the master to save the imperiled property extends so far as to call for a sacrifice of a part of the owner's property if necessary to save the cargo. *In our opinion the master's duty as agent of the owner is not so extensive. If it were, there would be an end at once of all contribution in general average for ship's sacrifices, for such sacrifices could not be deemed voluntary and extraordinary, if made in performance of the owner's general duty to his cargo*"* (225 U. S. 54).

The Court then goes on to discuss the leading cases dealing with the shipowner's obligations after a disaster, and points out that they do not impose any obligation to sacrifice the shipowner's own money or property for the benefit of the cargo. Thus, in the leading case of *The Maggie Hammond*, 9 Wall. 435, 459, the rule is laid down that it is the duty of the master to transship the goods when the vessel is wrecked; but upon so doing "he is entitled to charge the goods with the increased freight arising from the hire of the vessel so procured".

The petitioner insists that if there had been no Jason Clause in the bill of lading, the shipowner would have had to incur the expenses at Norfolk just the same. It may be true that some of them would have had to be incurred; but they would not have had to be paid by the shipowner. He might very well have employed stevedores to take the cargo out of the vessel and let them exercise

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* Italics ours.

their possessory lien as security for their payment. He could have notified the cargo owners to come forward and pay the expenses chargeable to their respective shipments, under pain of having them left at Norfolk subject to various liens for handling, storage, etc. The argument that the Jason Clause relieves the shipowner of a liability which would otherwise rest upon him was sufficiently answered by this Court in the *Jason*. The passage above quoted from the opinion in that case deals with this question clearly, specifically and finally; it would be useless for us to elaborate or paraphrase that language.

In considering the stipulated fact that the expenses here in controversy were of a general average nature, it must be borne in mind that such expenditures must be made "for the benefit of the whole adventure *and for no other purpose*",* as pointed out in *Ralli* v. *Troop* (*supra*, p. 22). In that same case this Court said:

> "In *The Mary*, in the District Court of the United States for the District of Massachusetts, Judge Sprague, a most eminent admiralty judge, held that a voluntary sacrifice, made for the general benefit of the whole adventure, and also for the particular benefit of the cargo, was not a subject of general average. 1 Sprague, 19" (pp. 407-8).

It follows necessarily that the petitioner cannot argue, consistently with the stipulated facts, that the expenses here in controversy were incurred by the shipowner wholly or partly for some purpose of his own.

The error which pervades petitioner's entire argument is the assumption that the loss which the respondents sustained was cast upon them by the Jason Clause. This assumption rests upon a plain negation of the stipulated facts. Since it is stipulated that the expenses in question

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* Italics ours.

were general average expenses, it follows that they were incurred to avert or minimize a greater loss. It results, therefore, that instead of casting a loss upon these respondents, the Jason Clause was the means of reducing or minimizing the loss which they would otherwise have sustained. If the master had not put back to Norfolk and the "Toluma" had sunk, these respondents would have sustained a total loss of their cargo; and this total loss would have been clearly recoverable from the "Sucarseco". How can it be argued seriously that the "Sucarseco" is not liable for expenses reasonably incurred by the respondents (through the master of the "Toluma" as their agent) to avert such a loss?

We deem it unnecessary to discuss at length "the rule of remoteness" upon which the petitioner relies. In connection with this rule the petitioner cites *Robbins* v. *Flint*, 275 U. S. 303, and similar cases. Such cases are readily distinguishable from the present case. All of those cases dealt with secondary damages sustained by the plaintiffs as a result of *injuries to the person or property of someone else*, that is, losses suffered by reason of interference with the profitable enjoyment of contracts. Such damages are held to be secondary and too remote to be regarded as legal damage for which the law will allow a recovery.

In *Robbins* v. *Flint* the claim was for injuries to the libellant's profitable enjoyment of a charter, although the vessel actually damaged was not owned by him or in his possession; and damages had been collected by the owner. In *Federal No. 2*, 21 F. (2d) 313, the claim was for reimbursement of an employer for amounts for which he was liable under a contract of employment to an employee on account of personal injuries. The physical injury, of course, was to the employee and not to the employer. In the case of *Insurance Company* v. *Brame*, 95 U. S. 754, the claim was by a life insurance company for reimbursement for sums which it had paid under a contract of life insurance. The act giving a cause of action for death

conferred this right only on certain relatives of the deceased.

The circumstances here are very different. Here, as a result of the negligence of the tort feasor ("Sucarseco"), the "Toluma" was so seriously damaged at sea that it was dangerous for her to proceed and her master decided that it was necessary for her to seek a port of refuge. The danger which threatened was not merely a danger to the ship, but to the cargo as well. In other words, the property *of these respondents* was placed in jeopardy; and it became necessary to make expenditures on behalf of these *respondents, for the protection of their own property.* If the master of the "Toluma" had failed to seek a port of refuge and had attempted to continue the long voyage on which the "Toluma" was bound, there was grave danger that the vessel and cargo would have been totally lost. No one questions the judgment of the master in seeking the port of refuge and consequently in incurring the expenses and losses which have been apportioned in general average and which are the subject of this litigation. These expenses and losses were incurred by the act of the master, acting as agent for all concerned, for the purpose of avoiding greater loss and minimizing the damage caused by the collision. All parties have agreed that these items of damage "are deemed to have been *caused by the collision* and to be provable, proved and allowed in this consolidated cause" (R., p. 28, paragraph 2).

Comparing the cargo owners' liability for general average contribution to the liability of an underwriter or a surety, may be a convenient method of illustrating certain aspects of the obligation; but if applied generally the analogy is very misleading. Petitioner relies upon the following passage from the decision of the Circuit Court of Appeals in the case of *Pool Shipping Co., Ltd.* v. *United States,* 33 F. (2d) 275, 277:

"The obligation of the cargo to contribute to the

> sacrifice made in the common interest amounted to an involuntary insurance for the benefit of the hull. The *Apache* was primarily liable and the indemnifying cargo to the extent of its contributive obligation was secondarily liable. The latter was, therefore, in the position of a surety and entitled to subrogation" (Petitioner's Brief, p. 55).

The Circuit Court of Appeals in the present case has repudiated the construction which the petitioner puts upon this language (*supra*, pp. 14, 15). That it is misleading if applied generally is apparent. Insurance is concerned only with payment for losses which have already occurred; general average is concerned primarily with averting a loss which is threatened. In this connection we quote as follows from the Fifth Edition of Gow on Marine Insurance (pp. 286-7):

> "The late Mr. Richard Lowndes, a past-master in all matters connected with this subject, remarked in the preface to the second edition of his classical work, *The Law of General Average*, 1874, that the subject of general average can never be as well understood as when it is studied apart from insurance, 'with which it is only accidentally associated, and as an outlying branch of the law of affreightment to which it naturally belongs."

The analogy of suretyship is even more misleading. If the cargo owner is a surety, he is surety for the third party *tort feasor* who has brought about the loss. If this extraordinary relation were established, it would seem that the surety, having paid the obligation of the principal, would be entitled to sue the principal for reimbursement; but this is just what the petitioner claims he cannot do.

That the cargo owners' rights do not rest upon the doctrine of subrogation is demonstrated by one of the

authorities upon which the petitioner chiefly relies. We refer to the decision in *Ralli* v. *Societa Anonima*, 222 Fed. 994. In that case, as the opinion clearly states, the non-carrying vessel sustained the greater damages; when the balance was struck, the carrying vessel was a debtor, and actually paid out money to the non-carrying vessel. Accordingly, if the rights of cargo interests in respect of their general average contributions depended on the doctrine of subrogation, they would have recovered nothing; for the carrying vessel, to whose rights the petitioner insists cargo was subrogated, had no right of recovery but a liability—an actual balance to pay. The petitioner itself (p. 54, Petitioner's Brief) cites the following passage from the decision of this Court in *Phoenix Insurance Co.* v. *Erie Transp. Co.*, 117 U. S. 312, 321:

> "In any form of remedy the insurer can take nothing by subrogation but the rights of the assured."

Nevertheless, Judge Mayer held that cargo interests were entitled to receive from the carrying vessel one-half of their contributions to all general average expenses with which that vessel had been credited in the collision suit. Would anyone suggest that an underwriter on a vessel which was damaged in a collision due to mutual fault was entitled to receive back from his assured any part of the loss paid under the policy, when the assured had actually recovered nothing but, on the contrary, had an actual balance to pay? And yet, the case of *Ralli* v. *Societa* is repeatedly cited throughout petitioner's brief in support of the "subrogation" theory.

POINT IV.

The general average nature of the expenses here in controversy is not derived from the Jason Clause but exists quite independently of that clause. In any event a third party tort feasor is not concerned with this question but only with the question whether the expenses were reasonably incurred to save the cargo from greater loss.

At page 53 of its brief the petitioner says:

> "That a part of these several items constituted expenses of a 'general average nature' was so, because of the contract between the Petitioner and the Respondents."

As we have already pointed out (*supra*, p. 29), the Jason Clause is merely an agreement to pay general average expenses for which the cargo would be liable in the absence of negligence, and does not alter or enlarge the class of expenses to be treated as general average expenses. The statement above quoted, therefore, leads to an absurdity. We agreed to pay these expenses because they are general average expenses; but (the petitioner says) they are general average expenses because we agreed to pay them. If the statement above quoted stood alone we should not discuss it seriously, but it is merely one illustration of a line of thought which is suggested throughout the petitioner's brief. The petitioner repeatedly speaks of "the maritime law of General Average" as of something fixed and immutable. These references are strongly reminiscent of the "mystic over-law" which this Court declined to recognize in the case of *The Western Maid*, 257 U. S. 419, 432. The implication of petitioner's argument appears to be that any attempt, in the contract of affreightment, to express, define or modify "the maritime law of General Average", destroys the integrity of this

mysterious and fragile code, and renders it wholly inoperative.

In answering this line of argument it becomes necessary to discuss briefly the basis and scope of the law of general average, and the sources from which it derives its authority. The origin of the system of rules to which the petitioner refers as "the maritime law of general average" is lost in the mists of antiquity; it undoubtedly antedates the Christian Era. Introduction to Lowndes, General Average, 6th Edition. Even the etymology of the word "average" as used in the phrase "general average" is unknown. Gow, Marine Insurance, 5th Edition, page 287. One of the authorities refers to it as "an unintelligible symbol". Maclachlan's Law of Merchant Shipping, 6th Edition, page 561. It seems clear that the word originally carried none of the significance of the modern English word "average". It related to the loss and not to the method of apportioning it. This is confirmed by the use of the same word in the phrase "particular average" to describe a partial loss or damage to which there is no contribution. Phillips on Insurance, Vol. 2, Sec. 1269, page 60. We think it is important to bear in mind that the term "general average" (or "common average" as it is expressed in French law)* does not refer to a method of adjustment, but to a loss which falls upon the entire adventure. The loss is general or common at the time it occurs; it does not become so by virtue of the adjustment and settlement.

The question whether the law of general average rests upon an implied contract has been much discussed, but never definitely settled. In *Ralli* v. *Troop*, this Court said that the authority of the master

> "may be treated as resting either on implied contract of the parties, or on the duty imposed upon him by the law, as incident to his station and office, to meet

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* See Code de Commerce, Sections 399 to 401, as set out in Lowndes, General Average, 6th Edition, Appendix K, pages [illegible].

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> the necessity created by an emergency which could not be foreseen or provided for, and to prevent the property in his custody and control from being left without protection and care" (157 U. S. 386, 397).

It has never been doubted, however, that the rules for applying the principles of general average (although not the principles themselves) may properly be the subject of express agreement among the parties concerned. These rules have also been extended and modified to meet new and changing conditions.

In its earliest form the law of general average applied only to very few cases; perhaps only to the jettison of cargo. During the Middle Ages, if not sooner, the principle was extended to a number of other cases, such as the cutting away of a mast and the payment of ransom to pirates. In the Ordonnance of Louis XIV, in 1681, we find a statement of the general principle that all "extraordinary expenses" incurred, and damage suffered for the common good and safety of the merchandise and the vessel, are gross and common average". Lowndes, General Average, 6th Edition, page 16. In modern times the principles of general average have been applied to a great number of new situations which arise naturally out of the complexity of modern affairs. This extension in the scope of the law, however, has not involved any deviation from the principles upon which the system originally rested. As this Court said in *Ralli* v. *Troop, supra*:

> "In the courts of England and America, general average has not been restricted to the cases put by way of illustration in the Rhodian and Roman laws; but it has never been extended beyond the spirit and principle of those laws" (p. 394).

The statement above quoted shows that the law of general average has a dual aspect. The general principles upon which the system rests are fixed and are not subject to change. We find them in the law of England and of the

United States today in the same form in which they existed in the Rhodian and the Roman law. The application of these principles, however, has expanded with experience and with the commerce of the world. Moreover, as ocean commerce developed, the application of these principles involved more numerous and more difficult problems. In the interest of convenience and uniformity, efforts were made from time to time to codify the rules of adjustment: sometimes by legislative enactment and sometimes by private agreement. In the latter class are the York Antwerp Rules, as originally promulgated and as successively modified. The history and text of these Rules down to 1890 will be found in an appendix to the 6th Edition of Lowndes, General Average (p. 803). A similar discussion of the 1924 revision of these Rules is contained in a work published by Mr. George R. Rudolf in 1926, entitled "The York Antwerp Rules". The text of this latest revision is printed as a supplement to the American Maritime Cases for 1925. For many years it has been customary to incorporate these Rules by reference in ocean bills of lading, as was done here (see Clause 12 of Bill of Lading quoted on p. 4 of Petitioner's Brief).

It will scarcely be argued that the York Antwerp Rules have changed the essential character of the system of law which they undertake to codify. The petitioner does seem to contend, however, that if a shipowner who would not otherwise be entitled to receive a contribution in general average is granted that right in the contract of affreightment, the contribution which he receives is not general average in the true sense of the term. This is the only meaning we are able to attach to petitioner's complaint that in the decision below

> "the distinction between an obligation imposed by law [*i. e.*, the maritime law of General Average] and an obligation arising only by contract [agreement of the parties to the incorporation of the

Jason Clause] is not recognized, nor applied" (Petitioner's Brief, pp. 26-27).

If there is any such distinction as the petitioner suggests, then there can be no true general average excepting in cases where the danger arises from an act of God or a public enemy; for these are the only perils for which a common carrier is not liable at common law. As to all other perils, the common law makes him an insurer; and the exemption which common carriers have enjoyed since long before the Harter Act (excepting as to the negligence of themselves and their servants) is based entirely on stipulations in the contract of affreightment. Consequently in all such cases the shipowner could not claim contribution in general average except for the existence of such stipulations, as he would otherwise be liable for all damages and expenses resulting from the accident.

In the case of *The Energia, supra*, the cargo was liable for general average under English law, which applied at the port of destination, only because the bill of lading contained a clause (valid under that law) exempting the shipowner from liability for the collision. This clearly appears from the opinions in that case.

The same is true of the case of *The Minnetonka, supra*. Even under English law, of course, a shipowner cannot recover general average contribution in respect of a loss for which he is liable.

> *The Carron Park, supra;*
> *The Minnetonka* (1905) Prob. Div. 206, 213, 214.

To test the petitioner's theory, let us suppose that in the present case the "Sucarseco" had been solely at fault; but that the "Toluma's" call at Norfolk was a departure from the normal course of her voyage (as to the New York cargo) and would have rendered the petitioner liable as an insurer excepting for the customary clause in the "Toluma's" bill of lading, giving her the privilege of de-

viation. *S. S. Willdomino* v. *Citro Chemical Co.*, 272 U. S. 718, 725. Would the petitioner say that the contribution paid by the New York cargo was not truly general average because if the rights of the parties had been governed by "the general maritime law" the petitioner would have been liable as an insurer and, hence, precluded from making any claim in general average? It would be most extraordinary if the liability of the "Sucarseco" should depend on the presence or absence of a deviation clause in the "Toluma's" bill of lading; and yet this would seem to be the logical result of the petitioner's argument.

The truth of the matter is that the question of antecedent fault or negligence has nothing whatever to do with general average as such. An act can only constitute a general average sacrifice if it complies with certain definite requirements. These requirements have been thoroughly understood and well settled for thousands of years. One of the requirements is that the act must be done to save the whole adventure from impending peril; but it is quite immaterial (in determining the general average character of the act) whether or not the peril was caused by some antecedent negligence. Such negligence may preclude one or another of the parties to the adventure from receiving what would otherwise be due to him as a result of the sacrifice; but it does not alter the fact that the sacrifice was a general average act. This was pointed out by Judge Addison Brown in *Chrystal* v. *Flint* (*The Irrawaddy*). He says:

> "In this country and in England it has been held that the mere fact that the common peril arose by bad navigation, or bad management of the ship, or that a remedy in damages therefor may exist against the ship owner, does not prevent recovery of general average compensation by a cargo owner against the ship and against other cargo owners for

his sacrifices made for the common benefit." 82 Fed. 475.

In the last analysis, the "Sucarseco's" liability for the amounts which these respondents contributed to the expenses at Norfolk does not rest upon the fact that they are general average expenses; but upon the fact that these expenses were necessarily incurred for account of these respondents in saving their property from a peril to which it had been exposed by the "Sucarseco's" negligence. The law of general average enters into the case only because it affords a convenient method by which shippers may arrange in advance to have their property protected in time of peril, and have their share of the necessary expenses fairly determined. The same result might have been accomplished without reference to the law of general average. The parties might have agreed that there should be no general average, but that some third party should intervene, in a situation of impending peril, and make whatever expenditures were necessary; and that these expenditures should be apportioned over the values involved. In such a case, just as in the present case, the "Sucarseco's" only concern with the agreement would be to determine whether it was a fair and reasonable method of accomplishing the result.

A very similar situation was actually presented in the case of *The Minnetonka, supra,* where the court said:

> "It seems to me that the only consideration is whether the compromise was reasonable—whether it was a reasonable way of adjusting the sum for which the wrong-doer was liable—and that the simple process of assessment does not break the chain of causality" (1905 Prob. Div., p. 215).

The law of general average is merely a set of rules to govern the conduct of a common agent in dealing with the

property of numerous absent principals in time of peril. These rules are the outgrowth of many centuries of experience. It has been found that they result in a fair distribution of the cost, in money or property, of saving a maritime adventure from imminent peril. As a matter of convenience the parties to such an adventure prefer to have their relations governed by these rules, rather than to attempt to formulate a special agreement in each case as to what shall be done in time of danger.

In ancient times merchants commonly accompanied their goods and took part in the consultation which preceded any sacrifice or expenditure. If they could not agree, the matter was sometimes settled by majority vote,—*i. e.*, by a primitive form of arbitration. Lowndes, General Average, 6th Ed., pages 6 to 9; also note (t) on page 9. When merchants ceased to sail with their goods the master, of necessity, became sole arbitrator; and rules were formulated, from time to time, for his guidance in the performance of this duty. The fact that his principals are no longer present does not alter the nature of his act. He is still disposing of their property with their consent, the only difference being that the consent has been given in advance instead of after the danger has arisen.

From the standpoint of a third-party *tort-feasor* who has created the danger, the ultimate question is not whether the sacrifice or expense is technically of a general average character, but whether it was reasonably necessary in order to avert the danger. As to such a third party, the fact that expenses are properly allowed in general average (as stipulated to be the case here), is merely a convenient form of proof that they were properly incurred and fairly apportioned. His liability, however, does not arise from the law of General Average, but from his own tort. We may suppose a case where collision rendered it imperative to jettison a deck-load, for which no contribution was due (Lowndes, General Average, 6th Ed., p. 61); clearly the

colliding vessel, if at fault, would be liable for the cargo jettisoned, although it was not technically a general average sacrifice. Let us vary the case by assuming that the deck-load consisted of timber, and that the master arranged with third parties to raft it to destination. Clearly the colliding vessel would be liable for this expense, although it involved no general average feature whatever.

The foregoing illustrations show that the law of general average does not enter into the liability of the "Sucarseco" excepting as a convenient method of apportioning the damages. This was pointed out, with his usual clarity, by Judge Addison Brown in the *Energia, supra.* As an expression of our thought, we cannot improve upon the following paragraph in his opinion:

> "A charge paid for a salvage service, made necessary by a collision, is strictly analogous to the present claim, so far as respects its directness; and the charge for salvage is always allowed as an item of damage against the ship in fault. *The Ackerman,* 8 Ben. 496; *The Fletcher,* 42 Fed. 504; *La Champagne,* 53 Fed. 398. It might as well be claimed that the law of salvage was in such a case the cause of the salvage charge, as that the law of average is the cause of the average charge against the cargo in a case like this. It is not the law, but the facts and the relations which the law recognizes, that are the causes and the grounds of the average charge" (61 Fed., at p. 224).

POINT V.

The judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

D. ROGER ENGLAR,
Counsel for Respondents.

LEONARD J. MATTESON,
Of Counsel.

New York, January 28, 1935.

No. 524.

APPENDIX TO RESPONDENTS' BRIEF.

ITEMS OF DISBURSEMENTS FROM GENERAL AVERAGE STATEMENT, INCLUDED IN PAR. 4 (a), STIPULATION, R. 29, PECULIARLY APPLICABLE TO CARGO.

Items	Page		
1-10	58-67	Stevedores' charges, discharging and reloading general cargo, coal, etc. at Norfolk	$16,918.72
27-29	76-79	Watching discharged cargo on pier	606.00
30-31	78-79	Transportation of stevedores, to discharge and reload cargo	374.90
38	82-83	Towing barges in connection with discharge and reloading of cargo	64.00
49	88-89	Wharfage and storage on cargo	537.60
55, 56	92-93	Insurance on cargo stored on piers	888.30
57, 58	94-95	Master's expenses unloading and discharging cargo at Norfolk	233.95
71	108-109, 110-111	Supplies for stevedores, loading and discharging cargo	195.87
		Total	$19,819.34
		Other items	16,009.11
		Total of all General Average Disbursements Recoverable as Collision Damage (Stipulation, Par. 4 (a), R. 29)	$35,828.45

N. B. In Appendix IV to Petitioner's Brief, dated Feb. 6, 1935, there is listed the following item:

"Item 87 Page 134 Interest on General Average disbursements $1,809.92."

This is not a correct description of item 87 which relates only to "allowance for overtime paid to members of crew $159.97."

The item of interest on general average disbursements is not included in the total of general average disbursements recoverable as collision damage amounting to $35,828.45 set forth in Stipulation Par. 4 (a), R. 29, this item having been omitted pursuant to agreement of the libellants to waive any claim for interest against the "Sucarseco" in this case prior to the date of the Stipulation of Agreed Facts (Stipulation, Par. 2, R. 28).

SUPREME COURT OF THE UNITED STATES.

No. 524.—October Term, 1934.

Aktieselskabet "Cuzco", as owner of the Norwegian Steamship "Toluma", Petitioner,
vs.
Steamship "Sucarseco", her Engines, Boilers, etc., Submarine Boat Corporation, et al.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[March 4, 1935.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

The question in this case arises out of a collision at sea between the Norwegian vessel Toluma and the American vessel Sucarseco. Both vessels were at fault and both were damaged. The Sucarseco proceeded on her voyage. The Toluma put into a port of refuge for necessary repairs. To permit these repairs, a part of her cargo was discharged; it was later reloaded and the Toluma completed her voyage. A general average statement was prepared which apportioned the expenses and losses, so far as they were of a general average nature, between the owner of the Toluma and the cargo owners.

Three suits were brought in admiralty and were consolidated for trial. One was a libel for damages brought by the owner of the Toluma against the Sucarseco. Another was a cross libel for damages by the owner of the Sucarseco against the Toluma. The third libel was by the owners of cargo on the Toluma against the owner of the Sucarseco to recover their damages, including the amounts which the cargo owners had paid as general average contributions.

The only question presented here is with respect to the claim of the cargo owners. Their right to recover against the Sucarseco, the non-carrying vessel, is not contested so far as the physical damage to the cargo is concerned. The contest is with respect to the contributions of the cargo owners in general average. The Circuit Court of Appeals, reversing the District Court, allowed that

recovery. 72 F. (2d) 690. Because of the importance of the question, which has not been decided by this Court, a writ of certiorari was granted, December 3, 1934.

There is no dispute that both vessels were seaworthy and that the collision was due to the fault in navigation of both vessels equally. No question has been raised as to the correctness of the general average adjustment. As, through the application to the instant case of the rule for the division of the entire loss equally between the vessels,[1] the ultimate share to be borne by the Sucarseco will not be affected by the determination of the present claim of the cargo owners, the Sucarseco is indifferent to the result and the claim is opposed by the Toluma.

The cargo was carried under a provision of the bill of lading, known as the "Jason clause", that in case "of danger, damage or disaster" resulting "from faults or errors in navigation", and if the shipowner "shall have exercised due diligence to make the vessel seaworthy and properly manned, equipped and supplied", the owners of the cargo shall contribute with the shipowner in general average "to the payment of any sacrifices, losses or expenses of a general average nature that may be incurred for the common benefit" to the same extent as if the danger, damage or disaster had not resulted from faults or errors in navigation.[2] The clause is substantially to the same effect as the one sustained in the case

[1]See The North Star, 106 U. S. 17; The Chattahoochee, 173 U. S. 540.

[2]The applicable clause in the bill of lading is as follows:

"In case of danger, damage or disaster resulting from accident or from faults or errors in navigation or in the management of or from any latent or other defect of the vessel, her machinery or appurtenances, from unseaworthiness, even though existing at the time of shipment or at the beginning of the voyage, if the defect or unseaworthiness was not discoverable by the exercise of due diligence and if the shipowner shall have exercised due diligence to make the vessel seaworthy and properly manned, equipped and supplied with respect to the matters concerned in the aforesaid danger, damage or disaster, then the shippers, consignees or owners of the cargo or the holders of this bill of lading shall nevertheless pay salvage and any special charges incurred in respect of the cargo and shall contribute with the shipowners in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred for the common benefit or to relieve the adventure of any common peril, all with the same force and effect and to the same extent as if such accident, danger, damage or disaster had not resulted from or been occasioned by faults or errors in navigation or in the management of the vessel or by any latent or other defect or unseaworthiness".

of *The Jason,* 225 U. S. 32, and has received its popular designation from that decision. Petitioner contends that the liability of cargo to contribute in general average results solely from this provision in the contract of carriage; that the owners of the Sucarseco were not parties to that contract; and that the claim of the cargo owners for the refund of their general average contributions is derivative and not directly recoverable from the Sucarseco, the cargo owners being entitled only to an accounting from their carrier (the Toluma) for their ratable proportion of that carrier's recovery. Respondents insist that cargo's contributions in general average are a part of cargo's "collision damage" and are recoverable from the Sucarseco as a tortfeasor in the same manner as physical damage.

While the damages due to a collision, when both vessels are at fault, are divided as between themselves, the innocent cargo owner may recover his full damages from the non-carrying vessel. *The Atlas,* 93 U. S. 302, 315; *The New York,* 175 U. S. 187, 209, 210; *Canada Malting Co.* v. *Patterson Steamships,* 285 U. S. 413, 418. This is so, although the carrying vessel may be free from liability to the cargo owners by reason of the application of section three of the Harter Act, 46 U. S. C. 192.[3] On a division of the entire damages between the two vessels, the non-carrying vessel may recoup one-half of the amount paid to the cargo owners. *The Chattahooche,* 173 U. S. 540, 554, 555. The direct liability of the non-carrying vessel "for all the damage to cargo" is "one of the consequences plainly to be foreseen", and the responsibility of the carrying vessel to the non-carrying vessel is measured accordingly. *Erie Railroad Co.* v. *Erie & Western Transportation Co.,* 204 U. S. 220, 226.

In the stipulation of facts, the parties agreed that the expenses, for which recovery is now sought as a part of cargo's damage, were "of a general average nature". The description is brief but adequate. It is a description which incorporates the essential conditions of general average. It means that there was a common imminent peril and a voluntary sacrifice or extraordinary expenses necessarily made or incurred to avert the peril and with a resulting common benefit to the adventure. *Columbian Insurance Co.* v. *Ashby,* 13 Pet. 331, 338; *McAndrews* v. *Thatcher,* 3 Wall. 347,

[3]Act of February 13, 1893, c. 105, 27 Stat. 445.

365; *Star of Hope,* 9 Wall. 203, 228, 229; *Ralli* v. *Troop,* 157 U. S. 386, 394, 395, 403; *The Jason, supra,* pp. 48, 49. It means that the sacrifice or expenses fell upon the whole adventure and were to be assessed in proportion to the share of each in that adventure. *Star of Hope, supra; Ralli* v. *Troop, supra.* This is the basic consideration in determining the present question.

Prior to the Harter Act, a common carrier by sea could not exempt himself from liability to the cargo owner for damages caused by the negligence of master or crew. *Liverpool Steam Company* v. *Phenix Insurance Company,* 129 U. S. 397. The Harter Act, prohibiting by sections one and two agreements with a shipowner which would relieve him from responsibility for the proper loading, stowage, custody, care, or delivery of the cargo, or from the duty to exercise due diligence to make the vessel seaworthy, provided in section three that if the shipowner did exercise due diligence "to make the vessel in all respects seaworthy and properly manned, equipped and supplied", neither the vessel nor her owner should be responsible for damages resulting "from faults or errors in navigation or in the management of the vessel". The question then arose whether a shipowner who had exercised that due diligence was entitled to general average contribution for sacrifices made by him, subsequent to a stranding of his vessel, in successful efforts to save vessel, freight and cargo. That right was denied the shipowner in *The Irrawaddy,* 171 U. S. 187. The point of that decision was carefully stated in *The Jason, supra,* p. 54. The Court there said that the authority of *The Irrawaddy* went no further than that "while the Harter Act relieved the shipowner from liability for his servant's negligence, it did not of its own force entitle him to share in a general average rendered necessary by such negligence". But, as the Harter Act had relieved the diligent shipowner from responsibility for the negligence of his master and crew, the Court decided in *The Jason* that it was "no longer against the policy of the law" for him to contract with the cargo owners "for a participation in general average contribution growing out of such negligence". Upon this ground, the validity of the "Jason clause", similar to the one now before us, was upheld.

What then is the effect of the "Jason clause"? It in no way changes the essential features of general average contributions.

It must still appear that voluntary and successful sacrifices have been made or extraordinary expenses incurred on behalf of those interested in the adventure in order to avert a common imminent peril, with resulting benefit to the adventure upon which the burden of such sacrifices and expenses appropriately rests. As the master of the ship is charged with the duty, and clothed with the power, to determine at the time "whether the circumstances of danger in such a case are or are not so great and pressing as to render a sacrifice of a portion of the associated interests indispensable for the common safety of the remainder", the effect of the "Jason clause" is to invest the master with authority and responsibility to act directly for cargo in relation to cargo's duty to contribute in general average. The master becomes for that purpose the representative of cargo. *Lawrence* v. *Minturn*, 17 How. 100, 109, 110; *Star of Hope*, 9 Wall. *supra*, p. 230; *Ralli* v. *Troop*, *supra*, pp. 397, 398; *The Gratitudine*, 3 C. Rob. 240, 257, 258, 260; *Burton* v. *English*, 12 Q. B. D. 218, 223. In *The Jason*, *supra*, p. 54, the Court pointed out that as sacrifices and expenses, in order to justify the general average contribution, must be voluntary and extraordinary, they could not be regarded as made in the performance of the general duty of the shipowner to his cargo. The "Jason clause" was sustained because it admitted the shipowner to share in general average only in circumstances where by the Harter Act he was relieved from responsibility. *Id.*, pp. 55, 56.

It is with this understanding of the effect of the clause that we come to the question as to the right of the cargo owners to include, in the damages they have suffered by reason of the collision, their general average contributions. That the extraordinary expenses, thus shared, were due to the collision cannot be gainsaid. It is because they were thus directly caused, that these expenses form part of the damages to be divided between the two vessels. On this basis they were included in the decree for division made by the District Court and the propriety of the inclusion of these amounts in the total damages to be divided between the vessels is not questioned. But the right to that inclusion springs directly from the tort and in that relation no question is raised as to proximate cause or foreseeable consequences.

The nature of these expenditures and the fact that they are traceable directly to the collision are not changed by the sharing

in general average. That merely affects the distribution of the loss, not its cause. The claim of the cargo owners for their general average contributions is not in any sense a derivative claim. It accrues to the cargo owners in their own right. It accrues because of cargo's own participation in the common adventure and the action taken on behalf of cargo and by its representative to avert a peril with which that adventure was threatened. Being cargo's own share of the expense incurred in the common interest, the amount which is paid properly belongs in the category of damage which the cargo owners have suffered by reason of the collision. *The Energia,* 61 Fed. 222; 66 Fed. 604, 608. The right does not stand on subrogation any more than the right of Sucarseco to bring into the division of damages the amount it has to pay to the cargo owners rests on subrogation. See *Erie Railroad Co.* v. *Erie & Western Transportation Co., supra.* In each case the right arises directly from the tort.

The contention as to remoteness is but another way of presenting the same question. This is not a case of an attempt, by reason of "a tort to the person or property of one man", to make the tortfeasor liable to another "merely because the injured person was under a contract with that other, unknown to the doer of the wrong". See *Robins Dry Dock & Repair Co.* v. *Flint,* 275 U. S. 303, 309; *Elliott Steam Tug Co., Ltd.,* v. *The Shipping Controller* [1922] 1 K. B. 127, 139, 142; *The Federal No. 2,* 21 F. (2d) 313. Here, cargo as well as ship was placed in jeopardy. That jeopardy was due in part to the negligence of the vessel against which the claim is made. The fact that the vessel and the cargo under the "Jason clause" bear their proportionate shares of the expenses gives Sucarseco no ground for a contention that the expenses themselves, or the share that cargo bears, were not occasioned directly by the tort. In the light of the nature of the general average contributions, and of the event which made them necessary, the fact that they were made under the stipulation in the "Jason clause" is no more a defense to Sucarseco than is the fact that the cargo was placed on board under a contract to carry it. Indeed, Sucarseco makes no contention of immunity. The question arises only because, through recovery by the cargo owners from Sucarseco, Toluma's share of the ultimate division is affected. But that does not establish remoteness. We have the anomalous situation that it is Toluma

that is opposing the cargo owners' claim against Sucarseco, while Toluma has collected from cargo its share of the general average expenses on the ground that they were incurred on cargo's behalf and were due to the collision.

As we have said, the "Jason clause" merely distributed a loss for which Sucarseco was responsible and in that view the cargo owners are entitled to recover that part of the loss which they have sustained.

The decree of the Circuit Court of Appeals is affirmed.

Decree affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.